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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-436 and 75-437

JAMES L. BUCKLEY, *et al.*,

Appellants,

v.

FRANCIS R. VALEO, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF THE APPELLANTS

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REPLY BRIEF OF THE APPELLANTS

INTRODUCTION

While this reply brief deals shortly with most aspects of the litigation, our treatment of the issues surrounding the appointment and powers of the Federal Election Commission is considerably more extensive for two reasons: First, there have been important developments respecting the FEC and its activities since the Court of Appeals opinion, and even since our main brief, which bear with particular sharpness on both appellees' "ripeness" arguments and on the substantive questions. Second, in the court below ap-

pellees took varying positions with respect to the Commission-related issues. We deferred full consideration of the various possible defenses in order not to burden this Court with material that might later become superfluous. The briefs filed in this Court by appellees and *amici* have justified this prudence.*

SUMMARY OF ARGUMENT

I.

Appellants clearly have the requisite standing to bring this action, notwithstanding the unclear arguments and highly selective distillation of the record presented by intervening appellees to the contrary. *Steffel* v. *Thompson*, 415 U.S. 452 (1974). This Court should decide the constitutionality of the challenged legislation now, rather than allowing its abridgment of essential freedoms to work their profound and pernicious effects on the American political system. *Dombrowski* v. *Pfister*, 380 U.S. 479, 491 (1965).

II.

Since limiting the contribution and expenditure of money for political purposes clearly implicates First Amendment freedoms, and given the positions asserted by the appellees, this Court is called upon to decide whether the rule

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* We will cite the other briefs filed in this case as follows: Brief for the Attorney General as Appellee and for the United States as *Amicus Curiae* — "AG Br. I"; Brief for the Attorney General and the Federal Election Commission — "AG Br. II"; Brief of the Federal Election Commission — "FEC Br."; Brief for the Intervening Defendants-Appellees — "IA Br."; Brief of Senators Hugh Scott and Edward M. Kennedy, *Amici Curiae* — "SK Br."; Brief for United States Senator Lee Metcalf, *Amicus Curiae* — "Metcalf Br."; the other *amici* briefs as appropriate; and our own main brief in this Court — "A. Br."

of such cases as *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), which protect free and robust political debate, or the result in such cases as *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), and *United States* v. *O'Brien*, 391 U.S. 367 (1968), which had previously been thought distinguishable from the *Sullivan* rule because of their special circumstances, shall govern omnibus regulation of the political process. The principles declared in *O'Brien* itself plainly require a different result here; here speech and conduct are not separable and the governmental interest is not "unrelated to the suppression of free expression." 391 U.S. at 367.

III.

Nothing appellees have brought forward indicates that the challenged legislation will have any substantial remedial impact on the abuses to which it is supposedly directed. Appellees have failed to show that "special interests" have been restrained; they have failed to show that corruption will be diminished to any significant degree; they have failed to show that campaign costs are "skyrocketing"; and they have failed to show that other remedies, more effective and less intrusive on constitutionally guaranteed freedoms, were not available.

IV.

Appellees fail to show why indiscriminate campaign expenditure limits are not unconstitutional. Nor are appellees able to rebut our contention that the expenditure limits discriminate in favor of incumbents and against challengers; their argument that our proof is "speculative" is all but a concession by them of what is basically a common-sense proposition. Appellees' inadequate use of election-financing statistics and their unwillingness to accept marginal-utility analysis only further reveal the weaknesses

of the positions they espouse. Expenditure limits are in effect regulations of the content of speech, because they discriminate against political newcomers and those with low name recognition. *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92 (1972).

V.

Despite their effort to read paid political advertisements out of the First Amendment's protection of press freedoms, appellees have in no way demonstrated any support for their specious attempt to distinguish between "personal activity" and other kinds of partisan political actions; their argument moreover defeats itself, since they admit the independent-expenditure limitation suppresses both. Congress had no evidence before it that any "loophole" in the FECA needed to be closed by means of 18 U.S.C. § 608(e). The First Amendment demands that "enforced silence" not be permitted on so speculative a basis. *Southeastern Productions, Ltd.*, v. *Conrad*, 43 L. Ed. 2d 448, 459 (1975); *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

VI.

Appellees fail to justify their extreme position that Congress has virtually limitless power to regulate contributions to political candidates. Appellees' paternalistic arguments, if accepted, would drastically reduce the electoral opportunities of candidates challenging incumbent federal officeholders and newcomers to the political process. The pitifully inadequate evidence appellees adduce on the "seed-money" point cannot sustain their arguments. And they have completely failed to disprove the discriminatory effects of the challenged legislation in view of incumbent access to enormous perquisites of office.

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974); *Police Dep't of Chicago* v. *Mosley, supra.*

VII.

The inadequacy of appellees' response to our "establishment" argument concerning Subtitle H of the Internal Revenue Code (A. Br. 145-52), and the contradictions and obvious fallacies in their own briefs concerning the discriminations against minor and new parties and independent candidates, fully demonstrate the dangers of unconstitutional government entanglement in politics when direct federal payments to parties and candidates are employed. *Meek* v. *Pittenger*, 421 U.S. 349 (1975). If Subtitle H is not stricken down, Congress will continually debate the problem of "who gets what, when, and how" in federal political subsidies in concrete situations involving the highest potential for partisan abuse.

While no system of allocating funds directly to parties and candidates can be truly equitable, I.R.C. Chapter 95 is one of the more irrational and discriminatory methods that could be selected. *Williams* v. *Rhodes*, 393 U.S. 23 (1968). Minor parties will be thwarted at their inception or preserved after their popular support has dissipated. I.R.C. Chapter 96 is not having the salutary effects hypothesized by Congress; quite to the contrary, it makes money more rather than less critical in pre-convention presidential campaigning. Finally, appellees have failed to rebut our contention that Subtitle H grants unconstitutional discretionary power to the Secretary of the Treasury in the allocation of federal subsidies; indeed, appellees themselves anticipate that that power will be exercised in a way that may deny minor parties and independent candidates even the post-election pittances which the statute purports to guarantee them.

VIII.

Freedom of association clearly encompasses financial contributions to political campaigns. *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57 (1973). This Court has protected lists of contributors from unwarranted disclosure, as it has similarly protected the membership lists of controversial organizations. *Bates* v. *Little Rock*, 361 U.S. 516, 519 (1960). Appellees have wholly failed to show that this case involves insufficient "chilling" of protected First Amendment rights. Nor have they even attempted to defend the sweeping overbreadth of the FECA disclosure requirements. See *United States* v. *Robel*, 389 U.S. 258, 265-66 (1967). Appellees stand wholly mute as to the uniquely burdensome and intrusive requirements of 2 U.S.C. § 434(e), requiring disclosure and reporting by individuals directly to the FEC when they make independent expenditures. See *Talley* v. *California*, 362 U.S. 60 (1960).

IX.

Since appellants, as active participants in the political process, are directly subject to FEC regulation and affected by it, and since the Commission's impact on politics has already been dramatic, appellants' challenge to the FEC's mode of appointment is clearly ripe, and they have the requisite standing to make it. *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247 (1974).

The Commission, because of its method of appointment and Congress' reservation of veto power over its rules, is concededly an "arm of Congress" and can constitutionally do nothing Congress could not do directly. But Congress has no plenary power, exercisable other than "by Law," with regard to the federal electoral process, nor do the so-called historical "precedents" offered by the FEC support any

such argument. *Powell* v. *McCormack*, 395 U.S. 489 (1969). An agency charged with enforcing a critical area of substantive federal civil and criminal law through interpretative and substantive rulemaking, advisory opinions, investigations, hearings and civil-enforcement actions consists of officers of the United States; thus presidential appointment and Senate confirmation are constitutionally required. See *Watkins* v. *United States*, 354 U.S. 178 (1957) and *Quinn v. United States*, 349 U.S. 155, 161 (1955). Astonishingly, Commission counsel disavows powers which the Commission has already exercised and is exercising today. And Congress' vigorous use of its veto power to protect incumbent advantages vividly demonstrates why an arm of Congress may not be crowned czar, with vast discretionary power, over the political process.

Only an agency not under the thumb of Congress — a truly independent agency — can constitutionally enforce whatever federal election law may remain in force when this case is over. None of the blatantly political arguments advanced by the FEC can justify perverting the Constitution in the indefensible manner attempted here. The proper remedy is to terminate the Commission's existence, leaving Congress free to create a constitutionally proper enforcement agency if it so chooses.

ARGUMENT

I.

Appellees' Attempt To Persuade This Court To Forgo Fully Deciding The Constitutionality of the Challenged Statutes Has No Foundation In Law, and It Invites Disastrous Consequences.

A. *Appellants Have Conclusively Demonstrated That They Are Harmed by the Challenged Legislation.*

Appellants' standing to bring this action is challenged only with respect to the issues concerning the Federal Election Commission ("FEC"); that challenge is dealt with *infra*, pp. 86-90. Intervening appellees do, however, present a highly selective distillation of the record in an effort to show that appellants are not "harmed" by the challenged legislation (IA Br. 23-24). The point of their argument is unclear. Intervening appellees did not appeal the lower court's ruling that appellants have standing to bring this action, op. at 1528, 1582,[1] nor do they raise standing as a jurisdictional issue before this Court. The originality of intervening appellees' doctrine is thus exceeded only by its pointlessness. And it is clear that under the existing precedents appellants are, as the Court of Appeals correctly held, sufficiently directly affected by the challenged legislation that they may bring this suit. *Steffel* v. *Thompson*, 415 U.S. 452 (1974); *Civil Service Comm'n* v. *Letter Carriers*, 413 U.S. 548, 551-53 (1973); *Roe* v. *Wade*, 410 U.S. 113, 124-25 (1973); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

Intervening appellees' incomplete version of the record includes a number of serious distortions and outright

[1] The opinion of the Court of Appeals has now been reported at 519 F. 2d 821. For consistency, appellants will in this reply brief continue to cite to slip opinion pages.

errors. Throughout their discussion of appellants, they refer to the allegedly few times that one or more of appellants have taken action which would today violate the challenged statutes. (See, *e.g.*, IA Br. 26, 27, 29, 30, 32.) But the contribution, expenditure and disclosure provisions of the challenged legislation need only be violated once to send to jail the person who chooses thereby to exercise his constitutional rights. Appellees also suggest that Eugene McCarthy and the Libertarian Party are not harmed by the federal-subsidy provisions for presidential elections because they would not accept such funding even if offered (IA Br. 33-34).[2] Under this novel theory of the First Amendment, no one is harmed by a government establishment of religion unless that person is willing for the government further to violate the First Amendment by supporting his own church as well. Obviously, appellants are harmed if their opponents in election campaigns receive federal subsidies for which they are ineligible. The suggestion to the contrary is frivolous.

Appellees appear to claim that because Stewart Mott has means of expression other than campaign contributions and independent expenditures, and because he is not "average" in his political and social activism, restrictions on his right of free speech are permissible (IA Br. 24) — a contention which, even if otherwise valid, would go to the merits rather than to standing. The availability of other outlets for speech is no justification for closing off an outlet which some may view as undesirable.[3] Mott, while exceptional, is far from unique. Even if he were, that would be

[2] Appellees ignore the Mississippi Republican Party, an element of a major political party which does intend to accept federal subsidies.

[3] See NLRB v Fruit & Vegetable Packers, 377 U.S. 58, 80 (1964) (concurring opinion of Justice Black, rejecting such an argument as similar to holding that "governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations").

a reason to accord him First Amendment protection, not to deprive him of it; the First Amendment protects the speech not only of the majority but of those who present different, controversial, and minority viewpoints. See *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

In their attempt to minimize the effect of expenditure limitations upon the future campaigns of appellants Buckley and Steiger, appellees have used past campaign figures uncorrected for inflation and, in the case of Buckley, fictitious figures urged by them on the District Court but expressly rejected by it in its findings (IA Br. 28-30). The inflation rate from 1966 to 1974 is 52 percent.[4] Therefore, Representative Steiger's 1966 expenditure of approximately $64,000 is, in 1974, equivalent to $97,000. This is substantially in excess of the $84,000 limitation[5] in 18 U.S.C. § 608(c)(1)(E). The inflation rate between 1970 and 1974 is 27 percent.[6] Senator Buckley raised approximately $1.8 million, Findings III, Buckley 17, p. 5, App. II B-703, not the $1.4 million claimed by appellees (IA Br. 28). Corrected for inflation the $1.8 million becomes $2.29 million. The expenditure limitation for candidates for United States Senator from New York, based on 1970 allowances per eligible voter, is approximately $1.5 million. Thus Senator Buckley obviously exceeded the FECA expenditure limitations in his 1970 race.

It is thus clear that the challenged statutes prohibit activity in which the appellants have engaged in the past and

[4] Calculated from the Consumer Price Index (U.S. City Average, All Items, Series A), prepared by the Department of Labor, Bureau of Labor Statistics.

[5] Representative Steiger did not face primary opposition in 1966, Steiger dep. tr. 50; thus all of his expenditures were made and intended for general-election purposes, and there can be no question that the $84,000 limit is the correct one for comparison.

[6] See n. 4, *supra*.

activity in which they wish to engage in the future. Like the petitioner in *Steffel*, each appellant is thus placed "between this Scylla of intentionally flouting . . . [the] law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel* v. *Thompson*, 415 U.S. at 462.

B. *Settled Judicial Policy Dictates That This Court Should Consider the Challenged Legislation Now.*

Appellees appear to argue that this Court should abjure deciding the critical issues in this case until the challenged statutes have been in operation for some unspecified period of time (IA Br. 37-42; AG Br. II 15).[7] Moreover, and ironically, in attempting to justify the statute they are now asserting that one of its chief virtues is that it can be changed in the event it turns out to be undesirable (*e.g.*, IA Br. 207).[8]

[7] When representatives of appellee Common Cause testified before Congress, they were not so cautious. See testimony of Fred Wertheimer, *Hearings Before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration on S. 23 et al.*, 93d Cong., 1st Sess. 269 (1973).

[8] Appellees would have this Court believe that our statement that "great deference to legislative decisions cannot be justified in the face of a plain conflict of interest," A. Br. 43, "defames the national legislature" (IA Br. 35). Under appellees' view, James Madison must be the greatest "defamer" of them all, for he wrote that "[n]o man is allowed to be a judge in his own cause because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time . . . . And what are the different classes of legislators but advocates and parties to the causes which they determine?" The Federalist, No. 10, Cooke ed. 1961, p. 59. Dean Pollak has wisely counseled that "[t]o insist 'that laws be equal in operation,' by uprooting those which are not, is a prudent exercise of

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What precisely they would have this Court do, however, is far from clear. They do not specifically ask for a holding that certain portions of the challenged legislation are not ripe for decision. If appellees were seriously advancing a ripeness argument, they would obviously have an obligation to identify to this Court with particularity what challenges to which statutory provisions were unripe; this they never do. Their lack of specificity indicates that their contentions are mere rhetorical flourishes, or perhaps an attempt to camouflage the weakness of their substantive arguments.

It may be that appellees are asking the Court to rule that Congress has some power, for instance, to limit political expenditures and contributions, but to refrain from ruling on the specific limits contained in the challenged statutes until some unspecified period of "experience" under them has been endured. If that is their suggestion, it verges on the irresponsible; they would be asking this Court to permit one or more Congresses and Presidents to be elected pursuant to what may later be determined to be an unconstitutional statute and regulatory system. Appellees elsewhere in their briefs express great concern for public confidence in the American government. (See, *e.g.*, IA Br. 64.) They nowhere mention the effects on public confidence of a perception that elections are being conducted under a scheme that protects incumbent officeholders from effective challenge by disaffected citizens, or of a discovery some years from now that our national legislature and Executive have been elected under unconstitutional laws which may well have affected the results.

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[8] (continued)
judicial power. It also seems prudent to take those prophylactic measures which will minimize legislative tendencies to enact laws of a different kind." Pollak, "Judicial Power and 'The Politics of the People,' " 72 Yale L.J. 87, 89 (1962).

The invitation to abstain from deciding the critical issues raised by this case is mischievous and indefensible. The Court of Appeals, quoting Mr. Justice Frankfurter in *United States* v. *United Auto Workers*, 352 U.S. 567, 570 (1957), described the issues presented here as "not less than basic to a democratic society" (op. at 1510). The federal appellees themselves have declared that "these appeals present substantial questions which warrant plenary consideration by this Court."[9] To avoid decision now would be to ensure that when the issues do come before this Court again — as they surely will — they will come in a piecemeal, erratic, and disorganized fashion. If even one person's candidacy is jeopardized by uncertainty over whether these statutes are constitutional, that is one person too many. Moreover, the future challenges will undoubtedly arise during the heat of an election campaign, with all the attendant pressures for a hurried decision before the impending election or convention. *Cf. Williams* v. *Rhodes*, 393 U.S. 23 (1968); *O'Brien* v. *Brown*, 409 U.S. 1 (1972); *ACLU* v. *Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom. Staats* v. *ACLU*, 43 U.S.L.W. 5043 (1975).

As this Court said in *Dombrowski* v. *Pfister*, 380 U.S. 479, 491 (1965), "[w]e believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others." More recently, this Court held that:

> "[w]here the inevitability of the operation of a statute against certain individuals is patent, it is

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[9] Memorandum for the Attorney General and the Federal Election Commission in Response to Jurisdictional Statements 1. The Attorney General has further stated that "[t]he United States recognizes that this case presents difficult questions close to the core of our system of government." (AG Br. I 1. See also *id.* at 93.)

> irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect . . . . 'One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.' " *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974).

The instant case provides a far more immediate situation for judicial action than did the *Regional Rail Reorganization Act Cases*. The requirements of *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), cited by intervening appellees, IA Br. 40-41, are also more than met here. The challenged statutes are now in operation.[10] These appellants and all other participants in the political process must today observe their strictures, and incur the chilling effects both of their prohibitions and their vagueness, at the risk of criminal prosecution. Pronouncements from the FEC now comprise almost an inch-thick sheaf of *Federal Register* pages. Copious evidence, cited throughout the briefs of all parties, indicates the profound impact the challenged legislation is already having on our national life. Every commentator on this legislation has spoken of the drastic effects it is having on the political process at this very moment.

Anything less than a complete decision of the merits of the present litigation would run the gravest risk that the American political system will be profoundly altered by legislation which eventually turns out to be unconstitutional. It has been suggested that it is too soon to

[10] *Amici* Scott and Kennedy's assertion that we challenge "every aspect" of the FECA and the FECA Amendments (SK Br. 1) is incorrect. As this brief and our main brief make clear, we refrain from challenging a number of provisions, including those which combat corruption without restraining speech, *e.g.*, 18 U.S.C. §§ 613, 614, 615, 617. See, *e.g.*, A. Br. 75-78.)

tell precisely how the challenged statutes will affect the political process. But, as the Attorney General cogently observes: "what must be decided now is whether, in light of the First Amendment, we can take the opportunity to find out" (AG Br. I 63). Appellees' mischievous abstention doctrine would, if accepted, present extraordinarily grave perils to the body politic of the republic.

II.

Appellees Have Failed To Demonstrate That Expenditures Or Contributions For Political Purposes Are Not Protected By The First Amendment.

Appellants argue that the contribution or expenditure of money for political purposes is protected by the First Amendment under such cases as *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), and the other cases cited at A. Br. 44-45. Appellees contend to the contrary that such contributions and expenditures are broadly regulable under such cases as *United States* v. *O.Brien*, 391 U.S. 367 (1968), and *Red Lion Broadcasting Co. v.* FCC, 395 U.S. 367 (1969) (IA Br. 74-78; AG Br. II 18, 52).

As the Attorney General has pointed out, cases like *Sullivan*, *Mills*, and *Miami Herald* form a body of case law "that shows political expression to be at the center of the unbridgeable freedom of speech, that protects paid-for political speech, that fears the deterrence caused by punishment after speech and abhors a restraint that prevents speech, and, finally, a case law that protects speech even when self-seeking and deceptive" (AG Br. I 14). These cases have been thought by all to state the general rule governing political debate.

It is clear from their arguments and the breadth of the FECA prohibitions that appellees would have this Court reject the rule of *Sullivan*, *Miami Herald*, and *Mills* in favor of *Red Lion* and *O'Brien*, cases that until now have been distinguished from the general rule because of the special circumstances they presented. Thus, intervening appellees candidly argue that they believe that political debate throughout the nation must be "structured" by law much as club regulations structure a college debate, with a panoply of rules about equal time, equal limits and the like (IA Br. 101). And the Scott-Kennedy brief argues that

Congress may regulate candidate expenditures by determining what level of expenditures affords candidates "an adequate opportunity to present [their views]" (SK Br. 68). It is clear from the face of these arguments that appellees would have this Court adopt the model of regulated speech represented by *Red Lion*, and reject the "uninhibited, robust, and wide-open" debate called for by *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 270. Even under *O'Brien*, however, the challenged statutes must fall, because no interest "unrelated to the suppression of free expression," 391 U.S. at 367, calls for such overbreadth (A. Br. 44-45).

Appellees seek to have it both ways. On the one hand, they and the supporting *amici* argue that candidates for federal office have an "almost drug-like dependence" on campaign funds (IA Br. 45). On the other hand, they also argue that "no firm relationship has been established between out-spending one's opponent and winning elections" (IA Br. 148). If, as is agreed by the parties and found by the District Court, Findings II, B 73, p. 207; App. II B 585, a firm relationship between spending and votes has not been established, the dependence of candidates upon campaign contributions can be explained in only one way: money is essential to political communication with voters.

Appellees cannot consistently claim that political candidates need to seek campaign money and at the same time argue that the FECA regulation of campaign contributions and expenditures can be distinguished from the regulation of political communication. To say "they merely limit the use of money in campaigns . . . .", IA Br. 91, is identical to saying "they merely limit political communication in campaigns." Campaign contributions and expenditures are the vocal cords of political communication. Without the former, the latter cannot exist.

Appellees note that in *Cox* v. *Lousiana*, 379 U.S. 559 (1965), a statute banning demonstrations in or near

courthouses was upheld, and they quote this Court (IA Br. 94) to the effect that:

> ". . . We are not concerned here with *such a pure form of expression as newspaper comment or a telegram by a citizen to a public official.*" *Id.* at 564 (emphasis added).

At last report, newspapers could not be published without cost, nor telegrams sent at no charge. Such "pure speech" obviously requires the expenditure of money or some other valuable resource. Prevent the expenditure of the money, and the speech is prevented as well. Here, a contribution of money to a political candidate, party or committee has exactly the same function as a telegram to a public official might have, or as the paid political advertisement held inviolable in *New York Times* v. *Sullivan, supra,* had. It registers support for one candidate, and opposition to his opponents.

Appellees' indifference to the impact of the FECA on political communication is starkly demonstrated by their position on the issue of "seed money" (IA Br. 120-29). Whether in beginning a campaign for a political issue or for a political movement, "up-front" money is needed to purchase those initial resources — offices, telephones, the items necessary for an initial mailing — to get the movement or candidacy off the ground (A. Br. 121-24, 129-38). The record fully demonstrates this proposition as to issues and candidates which seek change and which thus do not have the benefits of media attention or incumbency in political office. "Seed money" never guarantees that either the idea or the candidate will gain public acceptance. It merely permits the public to be exposed to new ideas and new candidates and to have an opportunity to evaluate their message.

Seed money is terribly difficult to raise through small contributions both because of the cost of mailings (agreed by the parties and found by the District Court to be 20 cents

per contact even before the impending postal rate increase) and because small contributions follow rather than precede public acceptance (A. Br. 136-38). Appellees would cheerfully sacrifice the presentation of new ideas and new candidates rather than permit money to be used to increase the alternative ideas and candidates exposed to the public.

"Merely" limiting the use of money for political purposes thus affects political communication as much as "merely" severing the vocal cords affects personal conversation. The assertion that the public is thus saved from candidates laden with improper obligations is clearly overdrawn; that the public will be "saved" from a robust and free debate is certain.

Indeed, appellees and supporting *amici* do not, in the last analysis, deny that the remedies they offer rely heavily on lessening the level of political communication. Thus, the Scott-Kennedy brief admits the "full awareness that the volume of political debate, the size of a candidate's audiences and the frequency with which they are reached may be substantially affected by the amounts of money that he is allowed to raise and spend for campaign purposes" (SK Br. 30).

Appellees also complain that the appellants unjustifiably discuss the merits of the FECA (IA Br. 39). In First Amendment cases, discussion of the congressional rationale is necessary since legislation trenching on political communication must be justified by compelling governmental interest. A foolish or frivolous statute, or a statute which in fact does not cure the evils it claims to remedy, or one which is only partially consistent with its rationale, cannot be based on a compelling governmental interest. *Erznoznik* v. *City of Jacksonville,* 43 U.S.L.W. 4809, 4810-13 (June 23, 1975); *Bigelow* v. *Virginia,* 43 U.S.L.W. 4734, 4739-40 (June 16, 1975); *Miami Herald Publishing Co.* v. *Tornillo, supra: United States* v. *Robel,* 389 U.S. 258 (1967). To some extent, therefore, both the rationale of the underlying

legislation and its actual impact on political communication must be examined, at the very least to determine whether the goal is compelling, the means chosen are reasonably related to that goal, and that subtle but highly discriminatory distinctions are not involved.

III.

Appellees Have Failed To Demonstrate That the Challenged Legislation Is a Remedy for the Specified Abuses or That Less Intrusive Means Are Not Available.

A. The Challenged Legislation Will Not Eliminate the Abuses to Which It Is Allegedly Directed.

Appellants have demonstrated not only that the challenged legislation is not responsive to a compelling governmental interest, but that it in fact aggravates rather than cures most of the ills alleged to be its rationale (A. Br. 55-78). Appellees have no answer for these arguments, preferring instead simply to provide a laundry list of instances of improper influence over official decisions sought or wielded by campaign contributors (IA Br. 44-65). In every case, with one exception, the challenged legislation does little or nothing to regulate the contributions involved to any significant degree. The one exception, the awarding of ambassadorships to large contributors, is clearly subject to the less intrusive means of the Senate's declining to consent to the nomination. (See A. Br. 76.) In every other case, the challenged legislation has little impact.[11]

Although there is now a ceiling on aggregate individual contributions, 18 U.S.C. § 608 (b) (3), the effect of this limit

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[11] Senator Pastore, Chairman of the Senate subcommittee that considered S. 372 and a Senate floor manager, has recently agreed that the impact of the legislation was not carefully considered. Senator Pastore stated that "[w]e have a law now that even the people who wrote it do not understand. I remember. I went to that conference and we were there for days and days and days and nobody understood what was in that bill . . . . We were running like scared rats. We thought the stronger we make it, the tougher we make it, the more people would believe us. I do not think they believe us any more today than they did before we passed the law." 121 Cong. Rec. S 17887 (daily ed. Oct. 8, 1975).

will be dissipated by the numerous other statutory provisions that allow organized economic interests to continue to contribute in very large amounts. Under 18 U.S.C. § 608 (b) (2), certain kinds of political committees are permitted to make substantially larger contributions than either individuals or other committees. The statute requires that such committees be registered for more than six months, receive contributions from 50 or more persons and give to five or more candidates. There are no limits on how many such committees may represent particular interests.

This provision thus permits organized economic interests such as the dairy industry or the AMA, see IA Br. 47-50, to give more money to candidates than other groups, since the six-month requirement is tailored to groups which are already well organized and have the finances to remain in continuous operation and contact. Whereas a six-month requirement will hamper philosophically motivated groups with widely dispersed members who want to respond to an issue as it arises, or who coalesce only near election time, organized interest groups can easily adjust to it.

Organized interest groups will also be better able to "proliferate" committees and thus expand their permissible giving to candidates more than will "issue" groups. Thus, medical associations and dairy interests can organize their political committees at the county level, each county organization being able to give $5,000. Civil-rights groups, anti-busing groups, groups seeking to expand the welfare state or groups promoting gun control will also have "six month" committees, but rarely will they be represented by more than one at any particular time. Because their adherents are dispersed and are not in continuous professional contact, only one or two such committees will have sufficient name recognition to attract contributions. The six-month requirement thus deters proliferation only among those less well-organized philosophical groups and not among organized economic interests. The examples in

appellees' brief of "special interest" contributions are actually examples of activities left untouched by the challenged legislation.

Appellees make virtually no attempt to answer this point other than to quote a wholly inapposite passage from the legislative history of the Act (IA Br. 131). The portion of the Conference Report quoted therein was obviously directed to organizations with a hierarchical structure and intended to limit the activity of political committees formed vertically therein. In the case of both the dairy interest and AMA, however, horizontal committees representing geographical areas within the states are involved and are simply unaffected by either the provisions of the statute or its legislative history. To be sure, the present organization consisting of a few large committees will have to be changed to increase the number of potential $5,000 donors, but the FECA does not restrict that. The need to avoid the status of "affiliated committees" (which are to be treated as one committee subject to a $5,000 contribution limit) is at most a marginal impediment to knowledgeable "special interests."

In the case of unions and corporations the challenged legislation very specifically fosters their financial participation in campaigns. They are also free to proliferate political committees, *e.g.*, every local union might have one committee while each corporation might have a stockholder committee and an employee committee. The challenged legislation, moreover, for the first time permits corporations which are government contractors — the largest corporations — to take advantage of the so called "segregated fund" provisions previously available only to unions and corporations without government contracts. 18 U.S.C. § 611. These funds can be administered by union or corporate money, subject to no statutory limits whatsoever, and the amounts raised can be directed to candidates through "six-month" political committees. Such funds are not required to let their contributors have any say about the

candidates to whom the committees contribute. It is thus possible for a union or corporation to raise $100,000 by spending $100,000 from its treasury. As a result, the temptation to make illegal corporate contributions — which appellees emphasize so heavily — is relieved, since corporate money can now be used to raise money for contributions. The illegal conduct relied on to justify the FECA is thus "reformed" by providing a functionally identical but lawful alternative. Thus, although individuals such as H. Ross Perot may not now directly make contributions in excess of $25,000, see IA Br. 55-56, they need not use personal funds for contributing but can have their companies raise and administer "segregated funds" and, through them make unlimited expenditures from the corporate treasury to raise funds for candidates. *The challenged legislation thus facilitates rather than limits the use of campaign money by organized economic interests.*

The chairperson of the Republican National Committee recently exhorted the National Association of Manufacturers to take advantage of the provision of the law permitting corporations to communicate with their stockholders and their families. She declared:

> " . . . under the new law corporations can, for the first time, set aside separate, segregated funds to establish and administer political action committees. While corporate money still can not be put into the committee fund, corporate money may be spent to administer the fund. So far, through the end of September 99 corporations have registered political action committees — there should be 999, or 9,999 — and still it would be only a beginning." Speech of Mary Louise Smith to National Association of Manufacturers Public Affairs Conference, Oct. 23, 1975.

While the challenged legislation carefully protects and fosters campaign spending by economic interest groups, it does nothing to end such abuses as giving to opposing candidates or making large late contributions which avoid effective disclosure. What the challenged legislation does regulate, and with a vengeance, are truly ideological contributions — those very contributions which fall most clearly within the term "pure speech."

B. Other Remedies Are More Effective and Less Intrusive.

We have previously enumerated a number of less intrusive and more efficient remedies for the specified abuses (A. Br. 75-78). Appellees, preferring the condemnation of corruption in the abstract to the rigorous examination of the FECA, have not responded to these suggestions or shown why these will not effectively remedy the problems.

Nor have they convincingly responded to appellants' suggestion that, apart from carefully drafted remedies responding precisely to a demonstrated abuse, disclosure to the voter is not only an adequate remedy but the one most consistent with democratic values. In their brief, for example, they emphasize that $20,000,000 was received by President Nixon in 1972 in large contributions from 153 people (IA Br. 65-66). It is also true, however, that $16,000,000 was raised by the Nixon campaign from large contributors before April 7, 1972 — obviously, given the unusually early date, in the belief that the contributions would not be disclosed. That strongly suggests that disclosure to the voter is the best deterrent to improper conduct or "excessive" reliance on large gifts.

C. Appellees Have Not Show Any Undue Increase in the Cost of Campaigning.

Appellees again rely entirely upon a comparison with the cost-of-living index to demonstrate an "arms race" in campaign costs. As we demonstrated earlier, the increases in campaign costs are readily explainable on grounds not suggesting any crisis or illness in the body politic (A. Br. 57-61). Merely as one example, advertising expenditures have increased at a rate greater than that of campaign expenditures (A. Br. 57). To the extent that candidates for office must compete with commercial and other advertisers for the resources employed in advertising, they necessarily have to pay more. That demonstrates only that a limit on campaign expenditures will necessarily limit speech.

Moreover, if the "sky-rocketing" increase in the cost of campaigning continues to be relied upon by appellees, surely they are under some obligation to explain why the cost of the frank has risen at twice the rate of the cost of campaigns generally (A. Br. 57-58) and yet is not limited by the challenged legislation.

IV.

Appellees Have Failed To Demonstrate That the Limitations on Candidate Expenditures Are Constitutional.

A. Appellees Have Demonstrated No Compelling Need Justifying Limitations on Candidate Expenditures.

Appellants have shown that expenditure limits are unconstitutional *per se* and serve no compelling state interests (A. Br. 79-87). Indeed, expenditure limits effectively reduce competition for federal elective office and are contrary to the pervasive national interest in full and robust political debate.[12]

Appellees' response is confused at best. They argue first that limitations on expenditures will aid the enforcement of limitations on contributions by reducing the temptation to raise large contributions (IA Br. 79-80). Even if that were true, a marginal increase in enforcement efficiency cannot justify such drastic limitations on political speech. See, *e.g.*, *United States* v. *Robel*, 389 U.S. 258, 262-67 (1967).

Appellees next argue that "equalizing" expenditures will equalize political opportunity (IA Br. 81-86, AG Br. II 23-27). As we demonstrate in our main brief, 94-107, and in

[12] Senator Muskie, a strong proponent of the FECA Amendments, has recently voiced his support for our position: " . . . since passage of the act last year, I have had increasing doubts about the constitutionality and wisdom of [expenditure limits] . . . . The right to communicate one's views to the voters, and the right of voters to make a choice among candidates based upon informed judgment of what a candidate stands for, is basic to our democratic process. . . . Spending limits which restrict that access may, in my opinion, be inconsistent with the First Amendment freedoms embodied in the Constitution" 121 Cong. Rec. S 17888 (daily ed. Oct. 8, 1975).

the next subsection, the particular limits on expenditures are by no means equal in view of their exclusion of the many financial and other factors favoring incumbents. In any event, *New York Times Co.* v. *Sullivan*, *Mills* v. *Alabama*, and *Miami Herald Publishing Co.* v. *Tornillo*, *supra*, stand four-square in the path of any attempt to apply *Red Lion*, *supra*, to the entire political process, for "equalizing" speech does not reflect a legitimate "non-speech" interest of the government.

Appellees claim that "reducing 'noisy' or 'excessive' communication is not a goal of these limits" (IA Br. 91 n. 104). That is flatly inconsistent with one of their principal justifications for the Act, just discussed: that it will "equalize" opportunities for political success. That means, if it means anything, that the political speech of some is "excessive" and must be curtailed in the interest of equality. It is understandable that appellees are uneasy with their own argument, since such a legislative purpose is plainly not "unrelated to the suppression of free expression." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968), and thus constitutionally is wholly illegitimate.

Appellees strenuously argue that the FECA limits do not regulate the content of speech. (See, *e.g.*, IA Br. 91.) That contention is plainly wrong, since the statute on its face applies only to expenditures for speech which advocates the election or defeat of a candidate. See *Gore Newspapers Co.* v. *Shevin*, 397 F. Supp. 1253, 1256-57 (1975). The statute thus depends upon a distinction between speaking for or against candidates and speaking on issues or non-political subjects — a distinction based squarely on content. *Cf. Thomas* v. *Collins*, 323 U.S. 516 (1945).

The common thread running throughout appellees' contentions is their expansive view of congressional power over political communication. They and the supporting *amici* argue that Congress may regulate expenditures without

limit so long as it leaves candidates for federal office "an adequate opportunity to present themselves to the public" (SK Br. 68). What opportunity is "adequate" is to be decided by Congress, and its judgment is to be shown deference by this Court.[13]

Central to appellees' argument is their attempt to misstate our position. We carefully defined the circumstances in which the First Amendment bars the regulation of campaign expenditures (A. Br. 45-48), and we also defined the narrow permissible zone of regulation (*id.* 51-54). Appellees blur this distinction by asserting that we deny any congressional power to regulate the expenditure of campaign funds (IA Br. 74). To the contrary, we explicitly argued that Congress can enact laws limiting the expenditure of campaign funds for non-political, *i.e.* non-speech, purposes (A. Br. 77). The FECA cuts sharply in the opposite direction: while limiting expenditures for speech

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[13] The Scott-Kennedy brief contends, citing Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 94-95, 169-70 (1961) and United States v. Robel, 389 U.S. 258, 271, 285 (1967), that this Court "will not review congressional findings of fact even in cases under the First Amendment" (SK Br. 49). Both of those cases involved the Communist Party and the security of this country. Even so, in *Robel*, the statute was invalidated, and the majority opinion stated that "the concept of national defense cannot be deemed an end in itself justifying any exercise of legislative power designed to promote such a goal." 389 U.S. at 264. See also New York Times Co. v. United States, 403 U.S. 713, 719 (1971) (Black, J., concurring); 729-30 (Stewart, J., concurring).

In United States v. United States District Court, 407 U.S. 297, 320 (1972), this Court stated with regard to the facts at issue there: "[w]e cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society." In truth, therefore, this Court does examine facts, particularly in First Amendment cases, where necessary to safeguard fundamental liberties. To do otherwise would simply result in abdication of the judiciary's responsibility to protect the Constitution.

purposes in campaigns, it legitimizes (and places no limits on) the use of campaign funds for non-speech purposes. 2 U.S.C. § 439a.

Since voter persuasion is at the heart of freedom of expression, and expenditures are essential for political communication, Congress may not limit such speech in the absence of a compelling need, and in no event unless "the governmental interest is unrelated to the suppression of free expression," *United States* v. *O'Brien, supra,* 391 U.S. at 377, which is not the case here.[14] We urge this Court to reject appellees' extreme view of a virtually unlimited congressional regulatory power over political campaigns.

B. *The Particular Limitations on Candidate Expenditures Are Discriminatory and Unconstitutional.*

Appellants have demonstrated that the FECA on its face systematically discriminates against challengers to incumbent officeholders (A. Br. 94-104). As we showed in our main brief, incumbents have enormous financial resources in the form of the frank, office, staff, etc., available to them in sums which exceed by far the amounts spent by challengers on all campaign expenses (A. Br. 99-103). Even when scrupulously employed, these perquisities

[14] Appellees' attempts to distinguish Deras v. Myers, 535 P.2d 541 (Ore. 1975) and Bare v. Gorton, 526 P.2d 379 (Wash. 1974) from the present case are futile, as even a casual reading of those cases will show. See Note, State Campaign Spending Restriction Violates the First Amendment, 49 Tulane L. Rev. 1146 (1975). Certainly there were provisions in those statutes not involved here, but the courts did directly and specifically address the question of limits on campaign expenditures. They held such limits unconstitutional.

give congressional incumbents immense financial advantages over challengers.[15]

Appellants have, moreover, shown that the use of these perquisites often performs campaign functions. It is well known, for example, that staff members frequently perform essentially political tasks, *cf.* Findings I, 28, p. 19, App. II A 21, and it is agreed by the parties and found by the District Court that peak periods of use of the frank are just before elections, *id.*, 34, p. 21, App. IIA 23. In the first two weeks of October, 1974, for example, 21.8 million pieces of congressionally franked mail were sent out. Wall Street Journal, June 2, 1975, at 5, col. 1. None of this is a campaign expenditure under the FECA, while every piece of mail sent by a challenger comes within the expenditure limits. It cannot be seriously contended that these 21.8 million pieces of franked mail do not involve, in amici's phrase, an "opportunity to present themselves [incumbents] to the public" (SK Br. 68).

Although appellees make much of their fear of the corruption inherent in private financing, they are virtually silent on this flagrant violation of principles of elemental fairness. Indeed, only two wholly transparent arguments are made to support the gross unfairness of the FECA limits on candidate expenditures. First, appellees ask this Court to ignore the vast perquisites of congressional office since they are not part of the FECA itself (IA Br. 112-13). They thus view the limitations on expenditures in isolation from all other laws or appropriations passed by Con-

[15] Astonishingly, the Scott-Kennedy brief suggests that appellants are not the victims of such discrimination because "none is a challenger to an incumbent or alleges that he wishes to challenge an incumbent" (SK Br. 66). Appellant McCarthy is running for President. Candidates of the Conservative Party of New York, the Mississippi Republican Party and the Libertarian Party are running for federal office as challengers at every level.

gress, no matter how functionally similar and no matter what discriminations are thus created.[16] This ostrich-like approach is hardly consistent with the Constitution.

Second, appellees suggest there are other remedies for the gross imbalance in campaign resources dictated by the FECA, *id.* These remedies remain unspecified, apart from the suggestion that a lawsuit might be brought by a candidate challenging his incumbent opponent's use of the frank (IA Br. 113). This is a totally inadequate response. Appellants' contention is not that incumbent perquisites are "abused" but that the FECA itself, by subjecting *every* expenditure by challengers to the limits, affirmatively discriminates, since only *some* expenditures by incumbents are covered. Incumbent perquisites perform, quite inescapably, a dual function: they are perfectly legitimate necessities in helping Congressmen do their jobs properly; but they *also* have inevitable political effects and in that sense are functionally interchangeable with expenses challengers must make from contributions they can raise

[16] Even beyond the frank, congressional staff and other incumbent benefits expressly excluded from the expenditure limits (see, *e.g.*, 39 U.S.C. § 3210(f)), the FECA does not on its face regulate what are euphemistically called congressional "office accounts." These accounts finance many of the activities by which incumbent office holders maintain contact with their constituents. Private individuals and interest groups are currently free to give unlimited and undisclosed amounts to congressional incumbents for these "accounts." There can be little doubt that such accounts have a political impact, for the Senate, in rejecting FEC regulations which would have treated them as campaign funds, clearly indicated that they were of value in campaigns, 121 Cong. Rec. 17676 (Senator Bell); 17880 (Senators Hatfield and Stevens); (Senators Pell and Ford) (daily ed. Oct. 8, 1975). The extent to which FECA will be construed to regulate "office accounts" is thus solely in the hands of the FEC and incumbent Members of Congress. Because all contributions to a non-officeholding challenger are treated as campaign contributions, the challenged legislation is unconstitutionally discriminatory on its face.

and must charge against their "equal" expenditure limits. Victims of discriminatory legislation trenching on First Amendment freedoms should not be required to institute actions of doubtful, if not frivolous, merit against other statutes in the hope that the discrimination will be lessened.[17] Nor, of course, do we argue that "the Constitution requires the government to provide challengers with some offsetting method of attracting ballots" (SK Br. 65); we do argue that the Constitution forbids government to prevent challengers from using self-help in employing offsetting methods — *i.e.*, expenditures equalling or exceeding, or at least coming closer than the limits permit to, the incumbent's real expenditures — if they can.

Appellees and supporting *amici* ask this Court to reject our claim of discrimination against challengers on the grounds that it is "speculation" requiring "elaborate factual inquiries" for which the Court is unsuited (SK Br. 47). We argue that when, for example, there is a disparity between candidates in name recognition, the candidate without high name recognition must be able to spend at a high level if that candidate is to have a viable chance of victory, regardless of what his opponent spends. The name recognition of challengers is typically lower than that of incumbents, and for that reason — and because of the financial perquisites available to incumbents which surely increase name recognition — limitations on spending will generally hurt challengers. It can hardly be denied, for example, that challengers seeking to defeat men with the high name recognition of *amici* Senators Scott and Ken-

[17] A candidate seeking to enjoin an opponent from using the frank would in all likelihood have to treat his litigation expenses as campaign expenses under the expenditure limits, see FEC Advisory Opinion 1975-27 (Oct. 22, 1975), since they are in the plainest way designed to influence the election. Any other ruling would encourage lawsuits by candidates to obtain publicity or to charge their opponents with misconduct.

nedy would have to spend at a high level merely to gain the name recognition essential to a viable — let alone successful — campaign.[18]

That is an *a priori*, common-sense proposition. It is no more "speculation" than the proposition that an "equal space" requirement will deter the printing of controversial material. See *Miami Herald Publishing Co.* v. *Tornillo, supra;* see also *Mills* v. *Alabama, supra.* Indeed, those very cases were decided on the basis of generalized "factual" propositions unsupported by record evidence. That a supporting record exists in this case merely adds to the force of appellants' claims.

Appellees further argue that deference should be shown to Congress' judgment about whether a particular limit is discriminatory against challengers. That, of course, asks Congress to be accepted as the "judge in . . . [its] own cause," *The Federalist*, No. 10, Cooke ed. 1961, p. 59, and imperils the First Amendment by permitting government to regulate speech on the basis of dubious findings of "fact."

[18] Appellees assert that Dr. Roland Cole agreed that "where incumbents exceeded both the ceilings and their challengers' spending, the ceilings would have benefitted the challengers" (IA Br. 146 n. 162). This is a complete misrepresentation of what Dr. Cole said. He agreed only to the obvious arithmetical fact that in the situation just described, if both challenger and incumbent were limited to and spent the same amount of money, then the difference in the amount of expenditures between the two candidates would have been narrowed. Cole dep. tr. 304-05.

This miscitation is typical of appellees' continued unwillingness to understand marginal-utility analysis. The fact that two candidates spend the same amounts where in other circumstances they would have spent different amounts quite obviously tells us nothing about the marginal value of each additional dollar of expenditures to those two candidates. As we have stressed, the marginal value of extra spending to less-well-known challengers is plainly greater than the marginal value of the same amount spent by well-known incumbents. See A. Br. 97.

Any case arising under the First Amendment can be made a "fact" case. Thus, the judgment as to whether requiring newspapers to give equal space to those they editorially criticize outweighs the deterrent effect on the printing of controversial matter would be, under appellees' position, a "factual" judgment to be made by the legislature. But see *Miami Herald Publishing Co.* v. *Tornillo, supra.*

In any event, Congress' actual judgment as to the political impact of the use of their perquisites not regulated by the FECA is abundantly demonstrated by the debate over "office accounts," a debate which demonstrated the firm conviction of the Senate that such accounts affect the results of elections. See p. 32 n. 16, *supra.*

The evidence fully and amply establishes the proposition that expenditure limits discriminate against challengers. Neither appellees nor supporting *amici* rely on any statistics other than the so-called "overall combined limitation," which has no relevance to the actual impact of the statute.[19] All parties agree that the FECA does not permit candidates to aggregate primary and general-election spending, and to use the overall limit as a measure of

[19] Appellees criticize Cole, Campaign Spending in Senate Elections (1975). (See IA Br. 1a-8a.) The criticism this dissertation received at the Kennedy School was no more than is typically directed at any such scholarly effort as part of the academic exercise. The criticism did not, moreover, in any way relate to the materials utilized by appellants.

The vociferous objection voiced by appellees to Cole's inclusion of repaid loans in expenditures (IA Br. Appendix A, 2a) has already been addressed by the FEC. The Cole method was upheld, and the Common Cause method rejected. See FEC Notice 1975-51, 40 Fed. Reg. 44698, 44699, § 100.7(a)(1)(i)(A)(1) (September 29, 1975). The Common Cause figures thus understate expenditures. Appellees' denunciation as "surely impossible" (IA Br., Appendix A, 2a) of a classification which the Commission has found required by the statute suggests also that the statute is not without serious problems of vagueness. (See A. Br. 211-20.)

comparision with spending in prior elections is thus utterly misleading. The Act clearly and unequivocally distinguishes between primary spending and general-election spending and does not permit candidates to spend up to the "overall limit" in the crucial time just before a general or primary election. 18 U.S.C. § 608(c). Congress has mandated the primary-general election distinction; and candidates subject to its terms must be concerned, not with the overall combined limit, but with what they can spend in the particular election they face.[20]

Even using the overall combined limitation as a guide, however, it is apparent that successful challengers do spend at a high level. Once any attempt is made by any method to segregate primary and general-election spending, the fact that successful challengers are "high" spenders (relative to the limits) becomes clear beyond peradventure. (See A. Br. 94-99.)

Indeed, it is hard to understand how the proposition that low limits will discriminate against challengers can be disputed. The proposition was widely accepted in the Congress and embraced by such enthusiastic supporters of the legislation as John Gardner and Fred Wertheimer of Common Cause and Senators Clark, Biden, and Cannon. (See A. Br. 98.) Only now, in the context of this litigation, is the proposition disputed.

A less frivolous argument is that, even if spending is of marginally greater value to challengers than to incumbents, the balance of advantage in a system of unlimited expenditures may still lie with incumbents if they are able to

[20] Appellees baldly state that it is not possible to segregate primary from general-election expenditures in past elections "with reasonable accuracy" (SK Br. 32 n. 11; IA Br. 136 n. 152). They simply ignore the agreed finding that it *is* possible to do precisely that — "with reasonable accuracy." Findings II. B2(c), p. 187; App. II B 569; see A. Br., Appendix A, A-2.

raise amounts which substantially exceed that raised by challengers (*e.g.*, AG Br. II 72). Actual experience, however, shows that the relatively great advantage incumbents have in fundraising is in those races which are never close. In 1974, challengers in 69 House races were able to spend more than the FECA's $70,000 limit. The average spending in those races by challengers was $113,094 while the average spending by incumbents was $106,230. Findings II, A-5, pp. 32-58; App. II A 327-86. The impact of the FECA ceiling on expenditures will be in those very races in which fund-raising capacity is already about equal or actually favors challengers.[21]

The low limits have been made even more onerous by the FEC's recent surprising decision that the large lawyers' and accountants' fees necessary to ascertain the meaning of the Act and to attempt to comply with it must be counted against the expenditure limits. FEC Advisory Opinion 1975-27 (Oct. 22, 1975). The bizarre result is that the harder a candidate tries to comply with the manifold com-

[21] The Scott-Kennedy brief suggests that the limits imposed by the FECA permit a candidate "an adequate opportunity to present himself to the public" (SK Br. 68). It devotes precious little discussion, however, to the FECA's impact as demonstrated in the record. *Before* the postal-rate increase, for example, one mail or phone contact with a voter, as agreed by the parties and found by the District Court, cost 20 cents, as against a 12-cents-per-person general-election limit in Senate races. Finding II, B-40, p. 200; App. IIB 580. The cost of raising small contributions by direct mail, as necessitated by the Act, runs at least 40 percent of the return. Findings II, B-50, p. 203; App. II B 582. (The FECA fund-raising allowance is 20 percent, 18 U.S.C. § 591(f)(4)(H).) Volunteers have to be supervised by a paid staff and the disclosure provisions of the FECA also impose substantial costs to be counted as campaign expenditures. Yet these are only the most basic organizational costs for challengers.

Intervening appellees chide us for not giving 1972 spending-per-eligible-voter figures for appellant McCarthy's New Hampshire campaign and President Nixon's general-election campaign. The figures in question are $1 and 36.9¢ respectively — both far in excess of the limits.

plexities of the statute, the more he is penalized and his less conscientious opponent is advantaged. Commissioners Aikens and Tiernan dissented from the opinion for illuminating reasons:

> "The Chairmen of the Republican Senatorial and Democratic Senatorial Campaign Committees in their comments regarding this Request stated,
>
> 'The burdens of complying with the Federal campaign laws and Commission regulations are far in excess of that anticipated by Congress when the 1974 Amendments were passed. Because of the complexity of the new law, nearly every Federal candidate will need an accountant and an attorney to strictly comply with its numerous requirements.'
>
> "They went on to note, 'The difficulties of compliance are particularly acute for non-incumbent challengers . . .'
>
> "The newcomer to politics, the volunteer campaign official, and the modestly funded candidate should not be dissuaded from entering the electoral arena because of difficulties in interpeting the Act; once involved in a political campaign, they should not be restrained in their actions or expressions because of uncertainty about the consequences of every deed." *Id.*

The limits are both stringent and heavily discriminatory against the unknown newcomer. They are in effect a regulation of the content of speech which will inevitably silence the challenger with low name recognition and limited access to the media. See *Police Dep't of Chicago* v. *Mosley, supra.* To say they are "neutral" or "evenhanded" is to exalt ~~form~~ over substance.

form

Appellees claim that the recent New Hampshire Senate election proves that the expenditure limits are not too low because the voter turnout was greater than in 1974 (IA Br. 138). Obviously special factors such as the great publicity, the closeness of the prior vote and presidential campaigning were not unrelated to the voter turnout. The real significance of the special election lies elsewhere:

> "John A. Durkin, the Democratic victor and new Senator, spent less of the overall $220,000 campaign ceiling than did Louis C. Wyman, the Republican loser, but Mr. Durkin was able to target his spending more effectively because thousands of dollars worth of his labor support fell outside the ceiling.
>
> * * *
>
> "There are over 45,000 union households in New Hampshire, and labor agents working for Mr. Durkin telephoned each one several times, mailed literature, distributed absentee ballots and even worked house-to-house in some working class districts on the day of the election.
>
> "Mr. Wyman had the benefit of volunteers who did many of the same things, but the expense of maintaining telephone banks and of printing and mailing literature was charged against his campaign spending ceiling, reducing the amount he could devote to other activities.
>
> "As a result, although Mr. Durkin spent about $25,000 less than his Republican opponent, he could afford $20,000 worth of television spots and $35,000 in radio advertising while Mr. Wyman spent $22,000 on radio and nothing on television at all." New York Times, September 22, 1975, at 12, col. 2.

If this were not devastating enough to appellees' position, one of Mr. Durkin's fund-raisers recognized that the spending limit would have benefited the incumbent had it not been for the unique circumstances:

> "'Because this was a rerun of last November's tie election,' Mr. Hemenway said, 'both candidates had very high public recognition. If we had been starting from scratch trying to establish our candidate with a $180,000 ceiling, Wyman would have beaten Durkin'." *Id.*

The New Hampshire election, so far from supporting appellees' position, provides an ominous foretaste of the vicious discrimination which the expenditure limits, if sustained, will spread throughout our political system next November.

C. Appellees Have Failed To Demonstrate That Other Discriminatory Distinctions Are Constitutionally Justified.

Appellees do little by way of explaining, much less justifying, other patently discriminatory provisions relating to expenditures. (See A. Br. 104-06.)

For example, although the role of political parties calls for permitting them to make expenditures on behalf of candidates, it hardly follows that the total expenditures permitted to independent candidates should not equal those of party-supported candidates. Yet the FECA enacts just such a disparity, 18 U.S.C. § 608(f). It is surely no answer to argue, as appellees do, that former Senator McCarthy can avoid such discriminations by running as a party candidate (IA Br. 153); the right to speak may not be so conditioned. Nor, obviously, would political parties be "outlaw[ed]" (*id.*) if independent candidates were allowed increased limits to equal what party-supported opponents can spend.

V.

Appellees Have Presented No Constitutional Justification for Limitations on Independent Expenditures.

Appellants have explained why the FECA's limit on independent expenditures, 18 U.S.C. § 608(e), is unconstitutional, and why the "loophole-closing" rationale of the court below is incorrect (A. Br. 107-16). Appellees seek to justify Section 608(e) by narrowing the meaning of freedom of the press.

A critical function performed by the press is the printing of paid advertising on public affairs, including advertisements advocating the election or defeat of candidates for federal office. That the press cannot be compelled to accept such advertising, see, *e.g.*, *Miami Herald Publishing Co.* v. *Tornillo*, *supra*, 418 U.S. at 254-56, in no way detracts from the proposition that paid political advertising is essential to a system in which a multitude of tongues are heard. Both the right to reject advertising and the right to purchase it reflect a policy of non-interference by the government. Indeed, the word "press" can in no sense be limited to the institutional press but must be taken to refer generally to all kinds of publishing, including the purchasing of political advertisements. *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938); *New York Times Co.* v. *Sullivan*, *supra*; *Bigelow* v. *Virginia*, *supra*. First Amendment rights would otherwise turn on an irrational distinction between buying a printing press and hiring someone who owns one. Section 608(e) is thus a direct restraint on publishing as well as on speech.[22]

[22] In any event, Section 608(e) does regulate the institutional press both through potential criminal liability and through surveillance (A. (continued)

The Scott-Kennedy brief seeks to distinguish between "personal activity" and other kinds of political activity in support of candidacies (SK Br. 59-60). This is not a distinction which has ever commanded consideration, much less acceptance, by this Court. Individuals concerned with public issues commonly sign advertisements drafted by others which support candidates. No one had ever thought to suggest that the author was entitled to greater protection than those who joined in the advertisement. The entire argument of *amici*, however, rests on the validity of such a distinction and the necessity to eliminate some "personal" activity in order to regulate the "non-personal," even though admittedly that "proximately affect[s] . . . [an individual's] personal enjoyment of opportunities to publish

[22] (continued)
Br. 115). Moreover, while appellees repeatedly misstate the statute as exempting from the limits all news stories, editorials, etc. (*e.g.*, IA Br. 161 n.181), in fact such press expression *is* subjected to the expenditure and independent-expenditure limits when the source is "owned or controlled by any political party, political committee or candidate," 18 U.S.C. § 591(f)(4)(A); see A. Br. 110 n.4. Thus, for example, if a candidate who owns a newspaper had reached his expenditure limit, his newspaper would be thereafter barred from editorially endorsing his candidacy, and presumably from printing any coverage which might be considered favorable thereto; it would also be barred from endorsing or favoring other candidates if the expenditure in question exceeded $1,000.

Ownership or control of news media by political parties is far from unusual in American history, dating back to the beginning of the nation when the First Amendment was framed, Mott, American Journalism 124 (1950). Horace Greeley, Democratic presidential candidate in 1872, owned and published the New York Herald-Tribune. James M. Cox, Democratic presidential candidate in 1920, also owned newspapers, as did Senator William Knowland and Representative Willian Randolph Hearst. Does Senator Buckley "control" his brother's National Review? The Republican Party certainly controls its publication First Monday. Thus substantial segments of the press are made directly subject to the expenditure and independent-expenditure limits and to the prior restraints which they impose.

his own thoughts" (SK Br. 56). Since both types of activity fall within the protection of the First Amendment, no such effect can be justified. *Amici's* argument is no more persuasive than a claim that a campaign oration is bereft of First Amendment protection if it is ghost written.[23]

Amici also argue that the invasion of this "personal liberty" is less than appears because only a small fraction of the population can afford to exercise it (*id.* 61). This also cuts a wide swath through what have long been considered protected activities. People frequently sign advertisements which advocate candidacies but which are not purchased on a *pro rata* basis. Until now, the "free riders" were thought to be engaging in protected political activity. *Amici's* extreme position should be rejected out of hand.

But there are more fundamental objections to the appellees' and *amici's* position. The very instinct of the First Amendment rejects the concept that otherwise perfectly lawful, peaceful — indeed, vital — speech may be cut off in the service of governmental purposes, particularly where those purposes are themselves constitutionally suspect. To be sure, it is possible that some wealthy contributors, prohibited from making direct contributions to the candidates of their choice, may instead spend money to com-

[23] Intervening appellees suggest that we argue "that the most difficult constitutional questions would arise if the section were applied to advertisements containing the purchaser's own speech" (IA Br. 161). We make no such argument; we think the distinction both illusory and irrelevant. It was intervening appellees themselves who made this argument in the Court of Appeals, urging the court "to construe the words of Section 608 to exclude individual expenditures to publicize the spender's own speech, should that be necessary" (Brief of Intervening Defendants in the Court of Appeals, p. 123). "We admit . . . that there is a bigger question when we are talking about speech of the contributor himself . . . . We think that presents a problem" (Court of Appeals, tr. of oral arg., June 13, 1975, p. 63 (Mr. Cutler)). These views have not thus far appeared in intervening appellees' presentation to this Court.

municate their political choices directly to the public in the form of paid advertisements or other partisan communications. Of course, there is no indication in the record or elsewhere how likely this is to occur, given the fact that it is far more cumbersome than simply making a contribution. But even assuming such activity may occur with some regularity, can the mere possibility of that "loophole" — before there has been any development of a problem — justify a flat restriction on speech?

We submit the Court's cases say that it cannot. Only last term this Court again stressed that the genius of the First Amendment and its ban against prior restraints is the notion that speech cannot generally be supressed in advance, and may only be subject to sanction, if ever, after its harmful effects, if any, can be assessed:

> "The presumption against prior restraints is heavier — and the degree of protection broader — than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free wheeling censorship are formidable." *Southeastern Promotions, Ltd.*, v. *Conrad*, 43 L. Ed. 2d 448, 459 (1975).

In a very real sense, Section 608(e) is premised on the same impermissible basis. Because of a fear that some individuals might use their independent expenditures as a loophole, the law chooses "to throttle them and all others beforehand."

Appellees suggest that the Court should refrain from invalidating the law until it can be seen how it functions (IA Br. 37-42). Surely, in the case of independent expenditures, Congress should have taken the risk and waited to see whether indeed there would be such a loophole before enacting this unprecedented limit on free political communication. The First Amendment demands no less:

> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

No legitimate justification has been offered for the "enforced silence" of Section 608(e). It should be declared flatly unconstitutional.

VI.

Appellees Have Not Demonstrated That the FECA Limitations on Campaign Contributions Are Constitutional.

A. *Wholesale Limitation on Contributions Violate the Constitution.*

We argued in our main brief that wholesale limits on contributions to political candidates, parties, and committees could not be constitutionally justified (A. Br. 116-27). As with expenditure limits, appellees misstate our argument. We do not contend that Congress is without power to impose any limitations on contributions. To the contrary, our main brief listed a number of regulable instances — *e.g.*, contributions made too late to be fully disclosed to the voter — of contributions carrying a high danger of improper purpose (A. Br. 75-78). Indeed, we were at pains to show that less intrusive regulations of contributions are available and in fact would be more effective remedies for the abuses specified. Thus we argued that *United States* v. *O'Brien*, 391 U.S. 367 (1968), in no sense justifies the indiscriminate inhibitions of the FECA, which in fact permits the demonstrated abuses to continue.

Appellees in effect contend that there is no limit on Congress' power to regulate contributions; that contributions simply have no constitutional protection (AG Br. II 62). The reasons advanced for this conclusion are patently insufficient.

One argument is that contributions are not necessarily used for speech purposes: "[s]ome will go to pay rent, some to conduct polls, some to pay travel expenses and salary, and some to cover the cost of public communications" (SK Br. 55). But all those activities are essential to political communication and are therefore constitutionally protected.

Every campaign expenditure is devoted either to direct communication with the voters or to ancillary purposes necessary to make political speech effective.

It is also argued that a limit on large contributions will provide access to many presently excluded from political participation (IA Br. 67-74).[24] This argument is hardly consistent with the attitude appellees exhibit toward the important function large contributions play in providing seed money to newcomers (*id.* 120-29). Appellees are perfectly content to see those who would otherwise have had an opportunity to expose their ideas to the public fully silenced and excluded. Indeed, large contributions themselves are frequently indispensable to public participation in campaigns. For example, the 1968 McCarthy campaign in New Hampshire involved the widespread participation of many volunteers. Yet it is clear from the record that if Senator McCarthy had not been enabled by large contributions to wage a viable campaign, such participation would not have occurred. (See A. Br. 127-38.) Similarly, the Scott-Kennedy brief, in defending 18 U.S.C. § 608(e), would prohibit those who now sign advertisements paid for by others which support or attack candidates from that form of participation.

In no sense does a limitation on contributions enlarge the access of others to political activity. Rather it silences the contributor and all those other participants whose opportunities would have been enlarged by the contribution. Large contributions increase political communication and thereby increase participation of citizens in politics. (See A. Br. 119-20.)

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[24] But *everyone* is excluded from such participation in general-election presidential campaigns by the federal-subsidy provisions. See pp. 56-57, *infra*. And the interests appellees represent are trying to extend that exclusion to congressional elections as well. See, *e.g.*, SK Br. 50-51 n. 41.

The argument that "equality" is somehow promoted by, and thus justifies, the FECA, is an impermissible rationale because it is not "unrelated to the suppression of free expression," *United States* v. *O'Brien*, *supra*, 391 U.S. at 377. Rather it falls within the admittedly unconstitutional examples mentioned by *amici* (SK Br. 29), such as limiting the amount of newsprint which might be bought in order to equalize the volume of news coverage, the number of readers, or the amount of influence the newspaper exerts. Indeed, *Miami Herald Publishing Co.* v. *Tornillo*, *supra*, involved the classic example of a statute designed to redress inequality in the ability to engage in political communication resulting from aggregated wealth; this Court held the statute unconstitutional.

Appellees' final argument relates to the obligations large contributions are thought to create (IA Br.79-81).[25] To the extent such obligations involve an illegal *quid pro quo* or other corruption, appellants have demonstrated in their main brief that far less intrusive, and far more efficient, means are either already available[26] or could be fashioned (A. Br. 75-78).

Appellees also appear to argue that any large contribution creates a political obligation so substantial as to require regulation (IA Br. 128). Indeed, it is suggested that, if a candidate received seed money from large con-

[25] Nothing in the record supports intervening appellees' insinuation (IA Br. 46) that large contributors are "generally" not disinterested. In fact, quite the opposite is true: money tends to follow philosophical inclinations. See A. Br. 65-66. The Scott-Kennedy brief is candid enough to concede that even more narrowly drawn statutes would largely ban "transactions which would be seen as wholly innocent if all the facts were known" (SK Br. 52).

[26] For example, if a jury believed Herbert Kalmbach's version of the dairy industry's 1972 contributions, IA Br. 48-49, it would convict those involved under the "unlawful gratuity" statute applied in United States v. Brewster, 408 U.S. 501 (1972).

tributors and was successful in his campaign, he will "be forever obligated to them" *id.*[27] This argument not only is overdrawn and basically anti-democratic, but also distorts the political process. Politicians seek votes, not money. They employ contributions in order to communicate with voters and to persuade them to vote for them. Their obligations upon election are in every sense to those voters, and acts inconsistent with those obligations, or perceived as inconsistent, will be at a political price.

What is necessary is that the voters have full and complete information as to the major sources of a candidate's support so that candidates will be fully sensitive to their primary obligation and cannot covertly act inconsistently with the interests of their constituents.[28] Those representatives who fail to act in the interests of their constituents can be penalized through democratic means. The FECA assumes that the voters are incapable of making rational decisions, and that those who know better can by law change the outcome. The First Amendment is a bulwark against such self-interested paternalism.

B. *The Particular Limitations on Contributions Have Not Been and Cannot Be Constitutionally Justified.*

The limits on contributions, like those on expenditures, are not even facially evenhanded (A. Br. 127-38). They do not affect the millions of dollars which finance congressional perquisites every year. Nor do they regulate

[27] The same reasoning would require prohibiting newspaper editorial endorsements of candidates, which may have far more influence with voters than the communication permitted by a contribution, and thus on appellees' theory create a far greater obligation.

[28] The suggestion that "since the turn of the century" (AG Br. II 32) disclosure has been tried and found inadequate is ludicrous. There were no even remotely effective disclosure requirements until the 1971 FECA.

or limit the large undisclosed contributions which presently go to congressional "office accounts" and which have political value. Again, appellees ask this Court to ignore the political environment into which the challenged legislation has been placed.[29]

Beyond that, the limits on individual contributions are highly discriminatory and, in effect, a regulation of the content of speech in view of 18 U.S.C. § 608(b)(2), which permits political committees, tailored to the needs of organized economic interest groups and susceptible of unlimited proliferation, to contribute up to $5,000 to candidates. So too, rigid limits on contributions by individuals and less well-organized groups serve to regulate content when more generous giving by unions and corporations is permitted. 18 U.S.C. §§ 610, 611. See *Police Dep't of Chicago* v. *Mosley*, *supra*. While contributions and expenditures by union and corporate "segregated funds" are subject to the limits, Sections 610 and 608 (e) (2) (B) *exempt from all limits* "communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject." Thus such favored organizations can (1) spend unlimited amounts to try to persuade their members to vote for a specific candidate, and (2) spend unlimited amounts seeking to induce their members to contribute to segregated funds. Both types of expenditures are illegal, if in excess of the limits, when made by anyone except those favored groups.

Finally, appellees have no answer to our contention that the stringent limits on individual contributions — not to be

[29] Intervening appellees falsely accuse us of misrepresenting the ABA Special Committee's position; they do so by directly misquoting what we said (IA Br. 88 n. 99; see A. Br. 75 n. 7). As to contributions, the ABA Committee endorsed "reasonable" limits but did not conclude that the FECA limits are reasonable.

adjusted for inflation like the expenditure limits, an anomaly appellees make no attempt to defend — will make it far more difficult for newcomers to enter the political process. Under the FECA the wealthy, as the Court of Appeals concluded (op. at 1533), will have little trouble raising "seed money," since the amount which a family can put to political use on behalf of a family member far exceeds that which can be put to use on behalf of other candidates. Compare 18 U.S.C. § 608 (a) with *id.* § 608 (b) (1). Incumbents, moreover, also have substantial resources to serve as seed money, including cash on hand from previous campaigns, mailing lists and the ability to raise funds ahead of a campaign. New York Times, Oct. 28, 1975, at 10, col. 2. (See A. Br. 130-31.)

Those who are effectively silenced are less wealthy newcomers who will be unable, given the difficulty and expense of raising small contributions through direct mailing, to get started. The record demonstrates two propositions beyond doubt. First, "seed" or "up front" money is essential to a viable candidacy (A. Br. 131-38). Second, the raising of small contributions through means such as direct mail is extremely expensive and costs at least 40 percent of that which is raised, a figure based on experience when fewer candidates were utilizing that method and which may now therefore be too low. Findings II, B-50, p. 203; App. II B 582. The effect of the contribution limits, therefore, is to make the expenditure limits even lower because fund-raising costs are included within them and the 20-percent-figure employed by the FECA is woefully inadequate.

Thus, in the case of Senator McGovern, upon which appellees continue to rely, the initial mailing was financed largely by contributions which would be illegal under the FECA. By the time of the New Hampshire primary only the amounts raised in large contributions over and above his mailing permitted him to wage a vigorous campaign. (See

A. Br. 135-36.) The *only* example arguably to the contrary is Ramsey Clark (a losing candidate, who received 38 percent of the vote). Mr. Clark had advantages not available to the typical challenger. He was well known and had a substantial constituency in New York State. The fact that he had severe difficulties in budgeting and raising money itself demonstrates what a heavy burden the limits on contributions will place on challengers to incumbents. (See A. Br. 134-35.)

Nor do the records of the candidates for the Presidency in 1976 help appellees, who list the amounts those candidates have raised to date (IA Br. 122-23.) In the chart below we list what they raised *and their present cash balances as of September 30:* *

CANDIDATE	MONEY RAISED '74-'75	CASH BALANCE
George Wallace	$2,971,698	$ 659,125
Henry Jackson	2,946,633	1,242,345
Lloyd Bentsen	805,258	194,869
Gerald Ford	706,926	427,606
Morris Udall	599,405	(-85,275)
Jimmy Carter	504,587	15,036
Ronald Reagan	396,463	(-90,130)
Terry Sanford	271,972	(-67,587)
Sargent Shriver	189,725	66,919
Fred Harris**	130,324	(-12,151)
Milton Shapp	101,338	20,405
Birch Bayh	81,782	60,399
Eugene McCarthy	78,600	7,323
Julian Bond	11,423	— —

*Washington Post, Oct. 15, 1975, at A3, col. 1.

**Includes national committee only and excludes 13 smaller state committees. Washington Post, Oct. 15, 1975, at A3, col. 1

At this stage of the campaign, a candidate would normally be accumulating a war-chest, not dissipating his money almost as fast as he receives it in a desperate attempt to

raise more small contributions. Clearly the contribution limits impose an onerous burden even on well-known candidates. Informed comment indicates that even the receipt of federal subsidies will not save many or most of the candidates from being driven out of the race at an early stage by financial starvation resulting from the contribution limits. Washington Post, Oct. 19, 1975, at A 1, col. 6; *id.*, Oct. 20, 1975, at A 1 col. 4; New York Times, Oct. 25, 1925, at 44 col. 2. Every indication is that the new law is making money *more* important in campaigns, not less so as it was supposed to do.

Finally, the Scott-Kennedy brief seeks to justify grossly discriminatory provisions permitting extensive use of family wealth on the grounds that the "emotional" concerns differ as between persons who are related to candidates and those who are not (SK Br. 72-73). Such a distinction seems to imply that for some unstated reason the First Amendment values genealogy over philosophy or ideology. This statute on its face disadvantages poor candidates by limiting their ability to seek funds in sizable amounts while permitting the extensive use of family funds by wealthy candidates. This is not only blatantly in violation of the First Amendment but totally inconsistent with appellees' rationale that this statute will open access to the political process.

Both on its face and in its operation, therefore, the FECA discriminates against newcomers and challengers to incumbents. Indeed, the discrimination is such as to amount to a regulation on the content as well as the quantity of political communication. *Police Dep't of Chicago* v. *Mosley, supra.*

VII.

Appellees Have Failed To Demonstrate Any Basis For Sustaining the Federal Subsidy Provisions of Subtitle H.

A. Funding Campaign Activities by Direct Payment to Candidates or Parties Is Unconstitutional.

We contend that no form of direct federal payments to political parties or candidates is constitutional because such payments are contrary to the "general welfare" and because of the constitutional perils inherent in establishing the existing two major political parties (A. Br. 145-52).[30] Appellees assert that such federal funding is not offensive to the First Amendment, and that Subtitle H neither establishes political parties nor excessively entangles the government in political affairs (IA Br. 186-93; AG Br. II 63-67). They argue that because the government has, in certain isolated instances,[31] attempted to foster expression by

[30] If either the contribution or expenditure limits, or both, are held unconstitutional, the federal-subsidy provisions must fall even apart from the arguments made in this section. The interrelationship between expenditure limits and federal subsidies was well understood by Congress. Senator Pell, Chairman of the Senate subcommittee that considered S. 3044 and one of the Senate floor managers of the legislation, stated that the two sets of provisions were like "the warp and the woof." 120 Cong. Rec. S. 4439 (daily ed. March 26, 1974). The relationship is equally close between contribution limits and federal subsidies. (See AG Br. I 101.)

[31] Intervening appellees cite "tax incentives to organizations devoted to developing and disseminating ideas" (IA Br. 190) as one such instance. However, tax credits and deductions in such circumstances support appellants' analogy to the case law construing the First Amendment's prohibition against establishing religion. Tax exemptions for religious organizations have been upheld, Walz v. Tax Commission, 397 U.S. 664 (1970), even while direct subsidization of sectarian schools has been struck down, Meek v. Pittenger, 421 U.S. 349 (1975). See Bittker, "Churches, Taxes and the Constitution," 78 Yale L.J. 1285 (1969).

private citizens, the government is also permitted to intervene massively in the electoral process through Subtitle H.

Citing *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), appellees argue that because Subtitle H is "ameliorative" its restrictions should be subject to a standard of review less strict than that for which appellants argue (IA Br. 193-94). They are incorrect. As Professor Ely has said: "The old saw that the government can 'deal with one part of a problem at a time' surely has no application in first amendment cases. See, *e.g.*, *Police Dep't* v. *Mosley*, 408 U.S. 92 (1972)." Ely, "Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis," 88 Harv. L. Rev. 1482, 1503 n. 83 (1975). Where government action trenches on an area explicitly protected by a constitutional restraint, the certainty with which that intervention could be characterized as "ameliorative" is simply not present. Thus in *Katzenbach*, *supra*, this Court declared that Congress, in the Voting Rights Act of 1965, adopted a measure to enforce the guarantees of the Fourteenth Amendment, 384 U.S. at 651 n. 10, but emphasized that Section 5 of that Amendment gave Congress "no power to restrict, abrogate, or dilute these guarantees." *Id.* Here, the First Amendment bars an abridgment of freedoms of speech and association whether or not the statute is labeled "ameliorative" or anything else.

Appellees incorrectly imply that we have argued that establishment-clause inhibitions should be automatically applied so as to keep government out of the entire area of communication and opinion to the same extent that the First Amendment keeps it out of religion (IA Br. 190, AG Br. II 64). We make no such contention. We do contend that the similarities between partisan politics and religion are so great that the same concerns that protect religious liberty should also protect political liberty, and that the necessity of avoiding governmental dominance and en-

tanglement is likewise comparable as between religion and partisan political activity. Politics, like religion, involves deeply held beliefs about the nature of society. Politics, like religion, can be and often is a source of divisiveness and dispute. Politics, like religion, involves the competition of ideas and philosophies. Since a time well prior to the adoption of the Constitution, political disputes have been, and are, far more likely than religious conflict to lead to unrest, disorder and even revolution if government is perceived as preventing free and open popular choice. Subsidizing some points of view but not others violates elemental fairness, and in effect inhibits the rights of the disfavored groups to freedom of speech and association, just as much in the political area as in the religious.

For all these reasons and those set forth in our opening brief (pp. 145-52), we think that the First Amendment, the general-welfare clause, the Fifth Amendment, and indeed the provisions of Articles I and II which require free and fair elections, all demand, together if not separately, a holding that Congress may not establish political parties.

Appellees insist elsewhere in their briefs that they are concerned about improper appearances and the adverse effects such appearances have on public confidence in government (IA Br. 105-07). When they come to federal subsidies, however, their concern for appearances abruptly vanishes. They ignore the obvious fact that in politics, as in religion, even the taint of suspicion that government is not acting evenhandedly must have the most devastating impact on the public perception of government's integrity.

Likewise, one of appellees' principal justifications for expenditure and contribution limitations — that they open up the political process and make elections more democratic by compelling candidates to "invite the ordinary citizen to take an active part in the campaign"[32] — falls by the

[32] AG Br. II 34. To the same effect see IA Br. 85-86; *cf.* SK Br. 44-45.

wayside when the federal-subsidy scheme is added to the package. In any campaign[33] entirely funded by public money, the opportunity for all citizens, ordinary or not, to participate financially and thus to implement their views is reduced to zero. As Senator Robert Kennedy testified in 1967:

> "To aid campaigns by direct subsidy from the Treasury would only further separate the individual citizen from the political process — insulating the party organization from any need to reach citizens, except through the one way communication of television and advertising. The political parties would talk to the citizen; but the individual could not effectively talk back." *Political Campaign Financing Proposals*, Hearings Before the Senate Committee on Finance 247-48, 90th Cong., 1st Sess. (1967).

Indeed, public financing could well induce candidates, relieved of all need to arouse the intense public interest that stimulates contributions, to engage in a race as bland, noncontroversial and noncommittal as possible — knowing that, no matter how low voter interest and participation became, a majority of one among whoever turned out on election day would be enough for victory.[34] Such a result would be recognizably similar to the conformist apathy and sluggishness that have frequently characterized religious life in countries with established churches. In the political arena, like the religious, establishment is the antithesis of free, healthy democratic life. Apathy on the one hand, and on the other hand sullen unrest perhaps amounting to violence from those excluded from the establishment.

[33] As *amici* admit, the interests represented by appellees are now vigorously seeking extension of federal subsidies to congressional elections (SK Br. 50-51 n. 41).

[34] The Attorney General recognizes this as a distinct possibility (AG Br. I 94). We think it highly probable.

would be an ironic consequence of political "reform." The political equivalent of religious life in Czarist Russia or 19th-century Spain may be appellees' idea of freedom and health; it is not that of the Constitution.

In attempting to deal with the effects Subtitle H would have had in past elections, appellees unwittingly reveal the dangers of entanglement between the government and political parties in this supposedly "ameliorative" statute (A. Br. 149-52).[35] Appellees argue, for instance, that "[i]f a Bull Moose phenomenon occurs in 1976, it will be time enough then for Congress to make any necessary adjustments for 1980 . . ." (IA Br. 207). It is precisely because of the continuing problem of congressional reappraisal of "who gets what, when and how" from Subtitle H that excessive federal entanglement is an insoluble problem so long as direct payments to candidates or parties are employed. Nothing in any of the briefs defending Subtitle H in any way rebuts this proposition.

The Scott-Kennedy brief poses the dilemma of a major-party schism (SK Br. 100). It offers as the "best" solution giving both wings of the split party full federal financing, a solution nowhere suggested by Chapter 95, but concedes that if such a solution is not authorized " . . . Congress will have to deal [with the gap] if the occasion

[35] Intervening appellees' citation from Professor Chafee in support of their argument, IA Br. 192, brings new meaning to the phrase "quoted out of context." The "essential facilities" Professor Chafee thought the government should supply were (1) a post office and (2) certain Army and Navy international-communication facilities to be made available for private use. Chafee, Government and Mass Communication 479-84 (1947). Indeed Professor Chafee provides a strong warning *against* Subtitle H: "Every new governmental activity in relation to the communication of news and ideas, however laudable its purpose, tends to undermine this tradition [that the government should keep its hands off the press] and render further activities easier . . . Appetite grows by what it feeds on." *Id.* at 477.

should arise." *Id.* What worse possible time could there be to call an intensely partisan Congress back into session to "deal" with or about such a problem? The Scott-Kennedy example plainly demonstrates why this Court should consider the issues now, and why it should avoid continuous and massive government entanglement in politics by declaring Chapter 95 unconstitutional.

All appellees' briefs are conspicuously silent as to the spectre posed if only one party should receive over 25 percent of the vote, as almost happened in 1860, 1912 and 1924 (A. Br. 153 n. 10). The resulting gross disparity in federal funding for the next election, which obviously would tend strongly towards creating a permanent one-party system, would hardly be likely to be "corrected" by a Congress presumably composed heavily of that very party.[36] This further confirms the danger of governmental entanglement in the partisan political process. It also highlights the significance of appellees' concession that just such continuing, *ad hoc* congressional entanglement is the only way in which the Act's obvious unacceptability as applied to various perfectly foreseeable situations could be relieved.

B. Appellees Have Failed To Demonstrate That Chapter 95's Operation Is Not Discriminatory Against Minor and New Parties and Independent Candidates.

We make no contention that any scheme of election financing would have to treat every announced candidate

[36] Nor, if appellees prevail here, would it appear that the "not while this Court sits" rationale (SK Br. 87) could be used to strike down the statute *at that time*. If a bias with respect to federal funding in favor of *two* "major" parties as against all others does not violate the First Amendment for reasons analogous to those behind the establishment clause, it is hard to see how a different result could be arrived at on a principled basis merely because the number of established parties as defined by the statute had been reduced by popular-vote developments from two to one.

with mathematical equality. Nor do we deny the real benefits of a two-party system or contend that a financing scheme is unconstitutionally discriminatory unless it makes other parties *better* off than they have been in the past. We do think it is clear that Congress may not, through discriminatorily allocated subsidies, entrench the two major parties in ways going beyond the perfectly legitimate dominance they have won in a free system through their own efforts and performance. Yet that is what the legislation does.

Intervening appellees claim that "[t]he statute in no way enshrines any particular parties . . ." (IA Br. 200). Intervening appellees appear ambivalent as to whether Chapter 95 offers two alternative routes (IA Br. 210) or only one (IA Br. 213) to obtain effective federal subsidies. If they are arguing that Chapter 95 provides two paths, they are wrong for the reasons stated at A. Br. 157-61 and AG Br. I 100. If they are arguing that Chapter 95 provides only one route (presently available only to candidates of the Democratic and Republican parties), they are most certainly correct. If they are arguing further that the government has thereby met its constitutional responsibilities, they have misperceived the correct standard of review. *Cf. Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974).

The recipients of the "benefits" of Chapter 95 are clear. For all the statutory definitions of "major," "minor," and "new" parties, and for all the language in appellees' briefs about what minor and new parties are "entitled" to, one stark fact remains. In 1976, the Republican and Democratic parties will, before the November election, receive more than $44,000,000 to be split evenly between them for their presidential campaigns and national nominating conventions, and *no other party will receive anything until after the election, if at all.* Faced with that kind of "benefit," new parties and independent candidates

hardly require "detriments" to make their tasks onerous, and their chances for success remote. It is hard to imagine a scheme more pointedly designed to "favor[ ] two particular parties," *Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968), over minor and new parties and independent campaigns struggling to be born.[37]

The weaknesses of appellees' argument are apparent when they belittle the means less intrusive than Subtitle H by which federal subsidies might be allocated (*e.g.*, IA Br. 212). They reject, for instance, as "impractical" the suggestion that the five-percent threshold of eligibility[38] for federal funding to minor parties could be met by a petition drive so as to give new parties some genuine means by

[37] On the basis of Williams v. Rhodes, it was predicted as early as 1969 that the Long Act, the predecessor of Chapter 95 which had generally similar allocation provisions, would be held unconstitutional in view of "the advantages the two major parties provided for themselves." Casper, "Williams v. Rhodes and Public Financing of Political Parties under the American and German Constitutions," 1969 Supreme Court Review 271, 284.

[38] In support of the five-percent requirement, appellees cite Jenness v. Fortson, 403 U.S. 431 (1971) (IA Br. 208-09). As the Attorney General has pointed out, the five percent required here is actually far higher than that in *Jenness*, since it must be accumulated from among a much smaller portion of the electorate, *i.e.*, those not voting for other candidates (AG I Br. 102). Moreover, the five-percent figure cannot be viewed in isolation, but must be considered as one element in the totality of discriminatory provisions adversely affecting new and minor parties and independent candidates, Williams v. Rhodes, 393 U.S. 23, 34 (1968). This totality includes not only the other discriminatory features of Chapter 95, but also the adverse effects of contribution and expenditure limits and sweeping disclosure requirements (A. Br. 94-106, 127-38, 178-84). Moreover, the statute upheld in *Jenness permitted* a petition drive; that decision can hardly support a statute which allows no such drive but unblinkingly denies new parties any way to escape the dead hand of prior-election statistics. Finally, being denied federal funding is *worse* than being left off the ballot; write-in candidates sometimes win, but unfinanced candidates never do. See A. Br. 158.

which their non-appearance in four-year old election results could be overcome. *Id.* They give no reasons, but cite only to the Court of Appeals opinion. That opinion states merely:

> "Evidencing support by petition signatures may provide an objective and more current measure but again it would siphon off considerable campaign energies into a petition drive" (op. at 1564).

There are several answers. First, independent candidates like Senator McCarthy and third parties often *now* must engage in petition drives to obtain a place on state ballots; their petition drives for federal subsidies would at most be no more than an adjunct to the ballot drives. Indeed there seems no reason why they should not be allowed to use their state-ballot petitions, monitored and checked by state officials (who are unlikely to be over-indulgent[39]), to qualify for federal funding.

Second, if federal subsidies are as highly desirable, and private fund raising as suspect and burdensome as appellees contend, one would think they would prefer to have new parties and independent candidates concentrating "considerable campaign energies" on a petition drive rather than concentrating those same energies exclusively on private fund raising.

Third, no party would be *obliged* to conduct such a drive; surely the decision as to whether the party's interests lie there or elsewhere is best made by the party itself rather than by Congress in denying the alternative altogether.

Fourth, how burdensome such a drive would be would depend entirely on the number of signatures Congress

[39] See Note, "Election Administration in New York City: Pruning the Political Thicket," 84 Yale L.J. 61 (1974); Reitman and Davidson, The Election Process: Voting Laws and Procedures 94-99 (1972); Mahoney, Actions Speak Louder 68-94 (1968).

required; if its judgment was that one signature obtained on a petition is more burdensome to obtain, and thus indicates greater seriousness and popular support, than one vote in the previous election, it could of course set the percentage of signatures required at a figure lower than the five percent required for prior-election performance. Thus appellees' objections to a petition drive as an alternative way to demonstrate "seriousness" for Chapter 95 purposes turn out to be wholly chimerical.[40]

Appellees point out that public funds need not be distributed to every citizen who chooses to declare himself a presidential candidate; we agree. Appellees leap from this statement of the obvious to the conclusion that Congress may draw an arbitrary line between "major" and "minor" political parties at 25 percent of the popular vote (IA Br. 210-11). It may be true that, as they suggest, once a line is necessary some arbitrary effects must be tolerated. But appellees never ask why a line dividing major and minor parties must be drawn at all. The party with the highest vote total could be given the full $20,000,000 subsidy, and all other parties exceeding some initial threshold (either by

[40] Equally illusory are appellees' objections to a tax check-off system whereby taxpayers designate the party or candidate to whom they want their tax dollar to go (AG Br. II 66; IA Br. 218-19). Appellees argue that taxpayers will not know who the presidential nominees are when they check off on their tax returns. Aside from the fact that precisely the same problem affects the *existing* tax check-off system, it is in fact easily remediable. The check-off form, which could be sent to taxpayers only in presidential election years rather than annually, and which could be in the amount of $4 rather than $1 (as I.R.C. § 6096 now provides), could be returnable for transfer of money into the subsidy fund until some point after the presidential nominating conventions take place. Separating the check-off form from the income tax return would also overcome another of appellees' objection, that political preferences should not be known to persons examining tax returns (IA Br. 219). These relatively simple changes would alleviate immense constitutional deficiencies.

prior-vote record or by petition) given amounts equivalent to the ratio of their candidates' votes to that of the highest vote-getter. Thus, because of the closeness of the 1960 election, Republicans and Democrats would have received almost identical amounts in 1964. Even following the recent elections with the greatest disparity in votes (1964 and 1972), the Republicans in 1968 and the Democrats in 1976 would still receive two-thirds of what the other major party would receive. Appellees are so ready to consign minor parties to private fund raising that they should have no objection to the same treatment of major parties where that is appropriate.

Such a solution could well entail severe constitutional problems; our basic point is that *no* method of allocating federal funds among political parties avoids such problems. (See A. Br. 150.) The choice Congress made unfairly disadvantages minor parties vis-a-vis the two major parties; the alternative would run the risk of further entrenching the most popular party by giving it more federal money than any of its competitors. The fact that the dilemma is inescapable should lead to a conclusion that direct federal funding of partisan campaigns is unconstitutional no matter how structured. *Cf. Miami Herald Publishing Co.* v. *Tornillo, supra.*

Appellees' briefs are replete with historical inaccuracies and mistaken conclusions. Intervening appellees attempt to rebut appellants' reference to Abraham Lincoln's grave as "just another burial plot in the cemetery" by pointing out that in the 1856 election the Republicans received one-third of the vote (IA Br. 206; SK Br. 97). That response completely misses the point. The crucial effects of public financing would have occurred in 1856, when John C. Fremont, running as the candidate of the new Republican Party would have been denied public funds. Chapter 95 would have completely funded the Democrats and the dying Whigs, but would have given not a pre-election penny to Fremont. In

all probability, that would have aborted his candidacy and the Republican Party in that year.[41]

The Scott-Kennedy brief goes to considerable length to demonstrate how beneficial Chapter 95 would have been in 1972 to the American Independent Party and its candidate, John Schmitz (SK Br. 98-99). The effort merely furnishes a present-day example that, as it would have done with the Whigs in 1856, Chapter 95 irrationally *preserves* third parties after their normal life expectancy. The dissent below noted this element of capriciousness (op. at 1606, dissent). See A. Br. 152-53.[42]

We submit that legislation producing such arbitrary, irrational and discriminatory effects cannot be sustained under either the First or the Fifth Amendment.

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[41] Such artificial preservation of the Whigs for at least one election, with little public support but rich sinecures and revenues, is reminiscent of the status of the established Anglican churches of Ireland and Wales — rich but empty — for generations after their popular support had virtually disappeared.

[42] The Scott-Kennedy brief erroneously states that the only newly formed party to have surpassed established parties was the Republican Party (SK Br. 97). The Whigs did the same thing in the elections of 1836 and 1840. The brief also states that the "Progressive Socialists" (presumably meaning the Progressive Party) "would have received 17 percent in arrears" after the 1924 election, *id.*; in fact, the Progressives would have received almost 41 percent of what the major parties received had Chapter 95 been in effect, and an equal amount in 1928, though they were not an on-going party — yet another example of how the dead hand of the past would distort the political process. The brief further errs in stating that only four candidates of new or minor parties have ever received over five percent of the popular vote. *Id.* In fact five other such parties have exceeded that threshold: National Republican (1828), Anti-Masonic (1832), Free Soil (1848), Constitutional Union (1860), and Socialist (1912). Findings I, 85 pp. 38-43; App. II A 35-42. Each of these parties would have had no pre-election federal subsidies in the years when they had substantial popular appeal, but *would* have received subsidies in subsequent years when their support had vanished.

Intervening appellees note that neither of the two major parties challenges Chapter 95 (IA Br. 199). Why should they? The Republican Party is even now preparing to take full advantage of the $22,000,000 federal subsidy by raising large sums of money that no longer need be used in presidential campaigns and applying it in congressional races. Broder, "The GOP's Financial 'Loophole,' " Washington Post, Sept. 14, 1975, at B 6, col. 3. Minor and new parties and independent candidates who do not share in the Chapter 95 bonanza are thus disadvantaged at the congressional level as well as in the presidential campaign itself.

Appellees' contention (*e.g.*, IA Br. 215) that minor and new parties and independent candidates will be better off under Chapter 95 than under the traditional system is belied by the fact that eight such parties[43] and candidates[44] or interests affiliated with them[45] are attacking the statute here, either as appellants or as *amici*. Not one such party or candidate has come forward to support these provisions. They are better judges of their interests, surely, than appellees.

Appellees concede *sub silentio*[46] that, as we pointed out (A. Br. 154 n. 12), post-election subsidies are available only to the extent that their expenditures have been made with borrowed money. This is a crippling restriction, and a wholly unnecessary one: why should the qualifying party or candidate not receive his full entitlement, to be used for

[43] Appellants Conservative Party of New York and Libertarian Party; *amici* Socialist Labor Party, Governor Longley of Maine, and California Peace and Freedom Party.

[44] Appellant Eugene McCarthy.

[45] Appellants James Buckley and Committee for a Constitutional Presidency-McCarthy '76.

[46] The Justice Department verges on explicitness. See AG Br. II 83.

general political purposes and preparation for the next election? As Senator Metcalf cogently demonstrates (Metcalf Br. 23-25), under Chapter 95 such parties and candidates are *penalized* for raising private contributions, since only if they *fail* to raise them but instead rely on credit can they become entitled to any post-election funds. This is utterly irrational, and in stark contrast to the *rewards* bestowed by Chapter 96 on major-party candidates for raising private funds in the pre-convention period.[47]

Finally, appellees' argument (IA Br. 223-225) that independent candidates such as appellant McCarthy are not denied any general-election financing is wholly incorrect. Even aside from the unlikelihood that such a candidate will have a prior-vote record, and the statutory denial to him of any way to qualify by petition, Chapter 95 expressly administers the coup de grace by denying him funding *merely*

[47] Moreover, the lack of access of third parties and independent candidates to substantial credit will usually reduce their "entitlement" to a nullity as a practical matter. The notion that banks will accept public-opinion polls as an indication of minor-party strength, on the basis of which they will lend money, SK Br. 94, is so fanciful that it hardly deserves comment. Third-party election-day performance is frequently considerably different from what the polls have indicated. See, *e.g.*, Mazmanian, Third Parties in Presidential Elections 96 (1974). Banks would be further discouraged by the complete uncertainty as to whether even a party which qualifies for post-election funding will in fact receive it, since the Secretary of the Treasury may not reserve adequate (or any) funds for that purpose. (See pp. 70-73, *infra*.)

Intervening appellees' argument that "ordinary bank loans are available without regard to the contribution limits in Section 608," IA Br. 214, is disingenuous. Bank loans that are endorsed or guaranteed are counted as contributions by the endorsers or guarantors, 18 U.S.C. §591(e)(1). Any bank obviously desires repayment of the loans it makes and, given the ephemeral nature of the political campaign organization, will almost certainly seek assurances to that end. Bank loans, therefore, will be subject to the same severe limitations as direct monetary contributions, with precisely the same harmful effects on minor and new parties and independent candidates.

because he is not the candidate of a party. The argument that the Committee for a Constitutional Presidency-McCarthy '76 could qualify as a "party" is simply wrong. The definition of *party* on which appellees rely (IA Br. 224) expressly requires that the candidate's name "appears on the election ballot as the candidate of" the group supporting his candidacy. McCarthy has no intention of allowing any party's name to appear on ballots in connection with his name; that would, in his view, vitiate what he believes to be the advantages and attractions of a genuinely independent candidacy. Why that choice should operate to deny him federal funds passes understanding.

C. Appellees Have Failed to Demonstrate That Chapter 96 Does Not Discriminate Against Certain Candidates.

Appellants have demonstrated that Chapter 96 of the Internal Revenue Code discriminates against independent candidates by its failure to offer them any federal subsidies during the same period when candidates for party nominations for the presidency are pursuing that goal, and that the primary matching-grant formula of Chapter 96 is invidiously discriminatory (A. Br. 164-68). Appellees attempt to justify matching grants on the ground that they "allow individual citizens to indicate by their contributions which candidates are most worthy of federal assistance" (IA Br. 228).

Such a response is flatly inconsistent with appellees' position on Chapter 95's funding system for general-election campaigns — which purposefully excludes such citizen participation —, as is the quotation from Professor Rosenthal they offer in support of their position on Chapter 96 (IA Br. 230). To defend the matching-grant system, appellees fall into the same inconsistency as the courts below (see A. Br. 168): they are forced to defend the role of private contributions, an exercise which is directly contrary to almost every page in the other sections of their briefs. They

are, moreover, forced to depart from the "one man, one vote" exhortations earlier in their brief (IA Br. 67-74). If they truly believed "one man, one vote" principles are applicable to the regulation of campaign financing, they would be arguing that federal subsidies should be dispensed based on the number of *contributors* to a candidate (*e.g.*, $5 of government subsidy per contributor without regard to the size of the contribution), rather than on the size of the contribution. Finally, appellees argue that the "20-state requirement has invigorated the early stages of presidential campaigns" because candidates are now spending extensive amounts of time raising funds (IA Br. 233). Earlier in their brief, however, intervening appellees were *decrying* the extensive amounts of time that candidates spent in precisely the same activity (*id.*, 72-73).

Chapter 96 has not produced the effects its supporters claim. Reporting on the contest for the 1976 Democratic presidential nomination, one skilled political reporter has written:

> "When Congress provided public financing for 1976 presidential candidates, through federal matching grants for small contributions, the belief was that it would erase the competitive advantage of the well-off candidate.
>
> "But at this stage of the Democratic nomination race, the greatest disparity between the contenders is financial. Two are affluent and the rest are struggling. And a growing number of participants in the race believe that the dollar squeeze may narrow the Democratic field faster than any other force." Washington Post, Oct. 19, 1975, at A 1, col. 6.

Experience is rapidly demonstrating that the FECA contribution limits are so crippling that even candidates who

qualify for matching funds will not be able to survive unless they win one or more of the very earliest primaries. See also Washington Post, Oct. 20, 1975, at A 1, col. 4. What "beneficial" effects Chapter 96 has had are thus dubious in the extreme. Its discriminatory effects, on the other hand, are plain and substantial.

All of the pulling and tugging by appellees, and all the inconsistencies in their arguments, indicate the severe problems inherent in attempting to justify Chapter 96 (and Chapter 95 as well). There need be no hesitation by this Court in striking down so constitutionally defective a scheme. Presidential campaigns now under way could readily adapt to a political world without Subtitle H. No funds have yet been distributed, and none will be until January 1, 1976, at the earliest. On the other hand, almost unimaginable practical problems could arise if the Court took appellees' advice and sustained this legislation, only to be confronted a few years hence with emergency challenges, perhaps in mid-election year, to hasty congressional tinkering with the statute in response to such a development as a major-party split which appellees admit the existing statute could not accommodate.

D. Appellees Have Failed To Refute Our Contention That the Federal Subsidy Provisions Vest Impermissible Discretion in the Secretary of the Treasury.

Appellees admit (*e.g.*, IA Br. 185) that, if the amount in the Fund were inadequate to satisfy the full entitlements of eligible candidates, problems of projections and priorities would arise. These must be resolved by the Secretary of the Treasury, a political appointee of a major party, who must look into a crystal ball many months prior to the election and prophesy, for example, whether any minor or new parties or independent candidates will be entitled to post-election funding on the basis of their election-day performance (I.R.C. §§ 9006(d), 9037). If he guesses wrong, they can receive nothing even though clearly entitled to it. He must make his decision during or before January 1976, since that is the month in which the matching grants to candidates for nominations become payable, and they have the *lowest* priority under the statute, I.R.C. § 9037; they should not be paid in full if funds will be inadequate to meet higher-prior entitlements, which include post-election payments to qualifying minor and new parties and independent candidates. Thus the Secretary's decision must be made long before a realistic assessment is possible as to whether any significant third parties will compete in the election, let alone the likelihood of their exceeding five percent of the vote. Even if the designated prophet were wholly apolitical, such diaphanous projections would be fraught with perils of error and injustice. The fact that the Secretary of the Treasury is not apolitical surely does not improve the situation.

Appellees' only response is to cite a recent estimate that the Fund will contain $100 million before the 1976 election and that this amount will be adequate to meet all entitlements (IA Br. 185). There are three answers.

First, even if this were so, it would provide no guarantee that acute problems of discretion and prophecy would not arise in future years. While it is true that the present trend in exercise of the tax-return check-off is upward, that trend is not necessarily permanent — especially if, as we predict, the public becomes disenchanted with federal subsidies, and indeed with the entire statute, as their effects in practice are experienced.

Second, the Fund presently stands at only $60 million (New York Times, Oct. 16, 1975, at 24, col. 1). Fully 40 percent of the "estimated" $100 million is yet to be checked off; the assumption is that check-offs will rise from $32 million in 1975 to $40 million in 1976, but there is no

assurance that this will happen, and there will be none in January 1976 when the Secretary must act. While the present projection may be as reasonable as the circumstances permit, it is perilous to permit crucially important matters of political equality and fairness to be affected with such uncertainties and hazards for mishap.

Finally, even the projected $100 million is not necessarily adequate. Of that amount, more than $44 million[48] must be set aside for the nominating conventions and the major-party general-election subsidies. That leaves less than $56 million. At present there are ten serious candidates for the Democratic nomination and two for the Republican. If all twelve candidates should qualify for the maximum $5 million matching grant, $60 million would be required for their federal payments; moreover, additional candidates may enter the race. If the Secretary accepts appellees' view that sufficient funds for all entitlements will be available in 1976, he will pay all these requisitions in full as they are submitted, without waiting to see what the total will be. The result could be that no post-election funds would be available if one or more third-party independent candidates qualified for them. If only one such candidate did qualify (as is hardly out of the question if, for example, George Wallace chooses to run) and obtained 15 percent of the vote with, say, 40 percent as the average vote of the major parties, then he could be entitled to as much as $7.5 million, making the total demands on the Fund more than $111.5 million, as compared to the very generous projection of $100 million for what it will contain. If the Secretary exercises his discretion by not setting aside substantial funds for the contingency of a third-party entitlement, the candidate will simply go unpaid, and the gross injustices of the statute would be even further compounded.

[48] That figure will have to be adjusted upward for inflation.

Here again, it is minor and new parties and independent candidates who bear the major brunt of the uncertainties and the discriminatory and otherwise bizarre features built into this legislation. The established two major parties are most carefully protected, at least so far as the nominating conventions and the general-election period are concerned.

In the pre-nomination period, the discretion-and-prophecy mechanism also presents the possibility of discrimination among major-party candidates. If, again, the Secretary, accepting appellees' view that the 1976 Fund will be adequate to meet all entitlements, pays all requisitions in full as they are submitted, and if he proves to be wrong and the Fund runs out, nothing will be left to meet later-presented entitlements. This runs the further risk of penalizing candidates who enter the race late — perhaps in response to new developments or issues — or who begin to make an impact later than their competitors. The statute contemplates this invidious possibility with perfect equanimity, providing that the Secretary "shall take into account, in seeking to achieve an equitable distribution, the sequence in which such certifications are received" (Section 9037(b)).[49] This is only one of the many features of the challenged legislation which have greatly extended the time span of the presidential campaign, thus placing additional heavy burdens on all candidates and reducing the flexibility of our political system to respond quickly to changes in circumstances.

[49] If, as seems probable, the Secretary is simply to pay requisitions in the order they are submitted, this is like providing that income-tax refunds or welfare payments shall be made from a limited fund to the first applicants until the fund is exhausted, with late-comers, otherwise equally entitled, to get nothing. On the other hand, if the Secretary has power to make any adjustments he deems "equitable," his discretion is unconstitutionally broad, especially considering his political bias.

VIII.

Appellees Have Failed To Justify the Fundamental and Sweeping Overbreadth of the FECA's Disclosure Provisions.

A. The Blanket Disclosure Requirements Concerning Contributions to Candidates for Federal Office Have Not Been Justified.

Appellants argue that, although in principle disclosure requirements serve a valid public purpose, the FECA's particular disclosure requirements (1) sweep overbroadly across protected First Amendment associational privacy rights (A. Br. 170-77), (2) serve no compelling governmental interest when applied to third-party and independent candidates for federal office (A. Br. 178-84), and (3) establish thresholds for reporting and disclosure that lack a substantial nexus with the governmental interests alleged to justify such thresholds (A. Br. 184-92). Appellees respond that third-party and independent candidates must be subject to precisely the same standards as major-party candidates (IA Br. 176-81; AG Br. II 29-31),[50] and that the disclosure thresholds are not too low (IA Br 174-76; AG Br. II 31). Appellees never come to grips with the substantial overbreadth of the FECA's disclosure provisions. Instead, they seek to justify the Act's blanket disclosure requirements by offering a few hypothetical examples of situations where, they assert, disclosure of the identity of contributors to third-party and independent candidates would be necessary to achieve compelling governmental purposes.

[50] *Amici* Scott and Kennedy state that we "apparently concede the constitutionality of disclosure laws as applied to the two major political parties" (SK Br. 76). This statement is, of course, incorrect to the extent it implies that we agree with the reporting and disclosure thresholds of the FECA.

But these examples cannot controvert the fundamental point that the universal sweep of the FECA does substantial harm to such association, while at best achieving minimal gains for any countervailing governmental purposes.

The appellees' own statistics demonstrate that the role played by most such parties and candidates in the overall picture of federal campaign financing is marginal. (See A. Br. 182; SK Br. 12.)[51]

Our point is precisely that the vital role which the more unorthodox third parties and candidates have played, see *Sweezy* v. *New Hampshire*, 354 U.S. 234, 251 (1957), demonstrates that the application of systematic disclosure requirements to them is both destructive and purposeless. As the *amicus* Socialist Labor Party has candidly declared, it views its presidential-campaign activities as a soapbox, "another means of education of the public regarding their political, social, economic and philosophical beliefs . . . ." In short, its candidates run for office not to achieve governmental power, but to communicate their dissident views to the public. Disclosure in that context cannot constitutionally be justified.

Federal appellees in particular have misread the applicable precedents concerning freedom of association.[52]

[51] The opposing briefs are replete with references to the "stalking horse" justification for imposing disclosure requirements on minor-party and independent candidates. But only three actual examples are cited (IA Br. 179-80, n. 210), and none involved the actual secret funding of any candidate for federal office. Nor does the extensive statistical record show any excessively large or special-interest contributions to any third-party candidate. The stalking-horse problem is more illusory than real.

[52] Federal appellees spend several pages rebutting an argument appellants do not make — that the First Amendment provides an absolute right to associational privacy (AG Br. II 38-41, 43-44).

They argue that "it is a strained concept" to say that those who support a candidate "are thereby joining in a new 'association' " (AG Br. II 45), and that such association "is very distant kin to the right of assembly which the First Amendment protects" (*id.* 46). Such arguments are in flat conflict with numerous decisions of this Court involving political association. See, *e.g.*, *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957); *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57 (1973); *Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975); *Pollard* v. *Roberts*, 283 F. Supp. 248 (E.D. Ark. 1968), *aff'd per curiam*, 393 U.S. 14 (1968). If the most effective argument in defense of the disclosure requirements' intrusion into freedom of association is that political campaigns do not involve "association," then the case in favor of the FECA's disclosure provisions is weak indeed.[53]

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[53] Similarly unpersuasive is the novel argument of *amici* State Election Commissions that association which takes the form of a contribution to a party or candidate is not protected by the First Amendment (Br. 14-20). Asserting that the NAACP cases involved membership lists, *amici* argue that contributors, as opposed to members, have no associational privacy rights. The premise is inaccurate and the conclusion unsound. First, this Court has never suggested any such constitutional distinction between members and contributors to an organization. Indeed, many of the NAACP cases involved a government demand for records of contributors as well as for membership lists. In Bates v. Little Rock, 361 U.S. 516, 519 (1960), the challenged ordinance "would have required disclosure of the names of the organizations' members *and contributors*" (emphasis added). Gibson v. Florida Legislative Investigations Committee, 372 U.S. 539, 542 (1963); NAACP v. Alabama, 357 U.S. 449, 461 (1958). Moreover, the association doctrine has been applied to protect the identity of purchasers of books from a lobbying organization, United States v. Rumley, 345 U.S. 41 (1953); United States Servicemen's Fund v. Eastland, 488 F.2d 1252 (D.C. Cir. 1973), *rev'd on other grounds*, 421 U.S. 491 (1975), and, of course, contributions to a political party, see Pollard v. Roberts, *supra*. Freedom of association is applicable to writing a check to the candidate of one's choice no less than becoming a member of an organization which shares one's beliefs. We have earlier suggested that

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Nor do prior decisions of this Court relied on by appellees preclude our challenges to these disclosure provisions. We have indicated why neither *Burroughs* v. *United States*, 290 U.S. 534 (1934), nor *United States* v. *Harriss*, 347 U.S. 612 (1954), is controlling here (A. Br. 186-87).[54] Nor do other decisions involving different disclosure requirements in other contexts supply the proper rule.[55]

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[53] (continued)

appropriate lines governing disclosure can be drawn (A. Br. 184). The point is not whether any particular line should be drawn, but rather, that Congress failed to draw any such lines at all.

In California Bankers Association v. Schultz, 416 U.S. 21, 78 (1974), the concurring opinion of Justice Powell joined by Justice Blackmun made clear that financial contributions are eligible for constitutional protection: "Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy."

[54] *Burroughs* did not, as the intervening appellees contend, "foreshadow" First Amendment analysis (IA Br. 170). Rather, the opinion accorded extensive deference to legislative choices of means to achieve particular ends, a deference which in the First Amendment area is no longer accepted. See, *e.g.*, United States v. Robel, 389 U.S. 258 (1967).

In *Harriss*, the court did observe that the "indirect" restraints of self-censorship "comparable in many ways to the restraint resulting from criminal libel laws," were too remote to warrant striking an otherwise valid enactment. Yet, in subsequent cases, the court has placed great emphasis on the need to guard against self-censorship in the areas of speech and association. See, *e.g.*, Speiser v. Randell, 357 U.S. 513, 526 (1958); New York Times Co. v. Sullivan, *supra*.

[55] Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913), upheld a statute requiring that, to receive second-class mailing privileges, publishers disclose certain limited information about their management and ownership. The requirements were held to be a valid

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Appellees wholly disregard the various standards proposed by appellants to determine which parties and candidates should be subject to disclosure of contributions.[56] (Compare A. Br. 184 with IA Br. 177-80 and AG Br. II 30-31.) The examples appellees offer — the "More Republican

[55] (continued)
condition imposed on receipt of a government benefit, insured the privilege was used only for mailing valid publications, and were justified by congressional power to classify categories of mail. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928), upheld disclosure of "oath-bound" organizations such as the Ku Klux Klan, premised on the need to deter illegal and violent activities. Viereck v. United States, 318 U.S. 236 (1943), involved the Foreign Agents Registration Act, but did not squarely present a constitutional attack and in fact, reversed the conviction because the lower courts had read the statute too broadly.

Finally, the decision in Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961), is not dispositive here. The Court's decision there was predicated on the rationale that the Communist Party was the agency of a foreign power and posed a threat to the government itself. The government interests identified in that case are of a different magnitude than the prevention of corruption in campaign financing. Moreover, two years later, this Court indicated that applying the rationale of that case to groups other than the Communist Party would raise grave constitutional issues. Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 547 n. 2 (1963); see also Boorda v. Subversive Activities Control Board, 421 F.2d 1142 (1969), *cert. denied*, 397 U.S. 1042 (1970).

[56] *Amici* State Election Commissions state that it is "unclear" whether appellants believe that only candidates not entitled to automatic ballot placement should be exempted from compliance with the disclosure provision, or whether the Mississippi Republican Party should also be exempt (*Amici* Br. 24). The answer is simple. We do not contend that the Mississippi Republican Party should be exempt from disclosure as a third-party, but only one facet of appellants' argument rests on the chilling effect of disclosure to third-party and independent candidates. (See A. Br. 178-84.) Appellants also contend that the FECA's requirements are generally overbroad as to *all* political parties and candidates, particularly with regard to the disclosure thresholds. (See A. Br. 170-77, 184-89.)

Party" and an independent Wallace campaign (IA Br. 178-79) — ignore the possibility that these hypothetical campaigns might in fact be covered even under more narrowly drawn statutes. This disregard for constitutionally more permissible modes of disclosure demonstrates appellees' inability to meet the "less intrusive means" test required when First Amendment rights are at stake. *United States* v. *Robel*, 389 U.S. 258, 265-66 (1967); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 512-14 (1964).

Appellees' discussion of the $10 and $100 triggering thresholds for reporting and disclosure is similarly inadequate. They nowhere attempt to justify Congress' failure to provide a cost-of-living adjustment for those thresholds. As inflation continues, in effect, smaller and smaller contributions are required to be disclosed.[57]

Moreover, appellees ignore the Attorney General's thoughtful suggestions that the fixed disclosure thresholds seriously lack proportionality in terms of varying expenditure levels and potential for influence on officeholders, and that the speculative problems of pooled contributions or a pattern of repeated contributions by a single individual could be dealt with by less sweeping provisions than the flat $100 disclosure and $10 record-keeping requirements (AG Br. I, 86-88). The point is not which

[57] The FEC has ruled that candidates for the presidential nomination of parties who desire to obtain matching-grant funds under I.R.C. Chapter 96 must supply the FEC with photocopies of all checks received from contributors which qualify to be matched with federal funds. FEC Notice 1975-22, 40 Fed. Reg. 33817 (Aug. 11, 1975). This regulation forces candidates for presidential nominations to disclose information about virtually *all* of their contributors to the FEC. Since the photocopies of the checks are presumably open for public inspection under the Freedom of Information Act, virtually *all* contributors' identities will be made known to the general public. No appellee has even attempted to justify this intrusion into associational privacy.

lines should have been drawn, but the fact that more precise lines were not.[58]

Appellees also contest the quantum of evidence adduced by appellants to support their position against the FECA's disclosure requirements (IA Br. 172-73; AG Br. II 47). Appellants have already stated that the record in this case does not reflect the same persistent and concentrated forms of harassment found in cases like *NAACP* v. *Alabama*, 357 U.S. 449 (1958) (A. Br. 173). Nonetheless, the right of associational privacy does not turn on a harassment index, requiring that a certain minimum number of people lose their jobs, receive threats or suffer acts of violence before a statute will be stricken down. It also turns on an assessment of the need for disclosure. Indeed, the court below

[58] *Amici* State Elections Commissions express concern that the ruling appellants seek would eliminate all state disclosure statutes. That is not necessarily true with respect to the disclosure-thresholds argument, since campaign spending for federal elections is generally much higher than spending in comparable state and local campaigns. Nor would a decision requiring more precise line-drawing where minor-party or independent candidates are concerned necessarily invalidate the variety of state disclosure statutes.

The Commissions also suggest that it would be constitutionally unfair and politically difficult to exempt some candidates and committees from disclosure requirements. However, at least two states, Minnesota and Washington, provide a mechanism for doing so. In Minnesota, pursuant to the Minnesota Ethics in Government Act of 1974, the Minnesota Ethics Commission is statutorily empowered to grant exemptions from disclosing the identity of contributors to political associations where disclosure would expose individuals to "economic reprisals, loss of employment or threat of physical coercion." M.S.A. § 10A.20, sub 8. Pursuant to that mechanism, the Minnesota Socialist Workers 1974 Campaign Committee has received such an exemption. See Doe v. Martin, _____ F. Supp. _____ (D.D.C. Oct. 20, 1975, Civil Action No. 75-0083) (involving a minor-party challenge to the disclosure requirements of the 1974 District of Columbia Campaign Finance Reform and Conflict of Interest Act, Pub. L. 93-376, 88 Stat. 446).

recognized this in striking down 2 U.S.C. § 437a, relating to disclosure of contributors to "issue oriented" organizations, and no defendant below appealed that decision. There, although there was substantial evidence of harm which would be suffered by the NYCLU, in the course of the Court of Appeals' extensive discussion of Section 437a (op. at 1549-60), only one footnote (op. at 1551 n. 130) was devoted to describing that harm, and the Court was silent on the harm suffered by Human Events, Inc. Instead the court quite properly focused on the utter lack of any justification for the section.[59]

To demand voluminous proof of the "chilling" effect of the challenged legislation can only result in a self-fulfilling prophecy — minor-party and independent candidacies will be aborted at their inception, there will be no contributors, and hence there will be no "proof" of harassment to such would-be donors. As Chief Judge Bazelon said in dissent, ". . . minor parties would wither and die on the vine awaiting the evidence required [by the majority below]. The spectre of reputations blotted and lives ruined by the release of membership lists is still too vivid to claim ignorance of the danger disclosure poses. 'All others see and understand this. How can we properly shut our minds to it?' " (Op. at 1594-96).[60]

[59] One of the minor-party *amici* notes the irony that, under the ruling below, various issue organizations are now free, and necessarily so, to have a significant impact on the political process without being subject to disclosure requirements, while minor parties which seek to have a similar impact are subject to the full thrust of this statute simply because they run candidates for office as part of their effort to communicate to the public (Socialist Labor Party Br. 10-13).

[60] Moreover, the record-keeping burdens themselves pose added obstacles and difficulties. The disclosure requirements not only burden associational rights, but also strain "the minor party's hard-pressed resources, financial and human, to interpret the provisions, compile the

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B. *Appellees Have Failed To Justify Requiring Disclosure by Individuals Who Make Independent Expenditures.*

Appellants have argued that 2 U.S.C. § 434(e), requiring that all persons who make expenditures under 18 U.S.C. § 608(e) in excess of $100 per calendar year file detailed reports of such expenditures with the FEC, is constitutionally deficient (A. Br. 189-92). Appellees are all but silent on the specific issue, have in no way rebutted this contention, and have failed to distinguish the one case squarely on point, *Talley* v. *California*, 362 U.S. 60 (1960). (See IA Br. 173 n. 202, and AG Br. II 40-41.) Section 434(e) is uniquely chilling since its reporting requirements fall, not on political organizations, but on private citizens, engaged in what they would reasonably regard as normal private conduct, and who will most probably be unaware of the

[60] (continued)
records and obtain legal counsel to comply with the reporting requirements of the law (SLP Br. 12). Even as to major parties, political campaigns typically involved large numbers of citizens — both as volunteer workers and as contributors — who are not professional politicians, and whose enthusiasm for and willingness to assist in electoral activities will be considerably diminished if they are subject to exacting and technical requirements, the infringement of which could lead to criminal prosecution. The FECA's disclosure provisions envelop politics in a maze of just such obscure obligations. As one campaign official recently testified, "[i]t is fundamentally unfair to require a volunteer 'industry' to respond to complex regulatory practice." Testimony of Loren A. Smith, General Counsel, Citizens for Reagan, Before the FEC Hearings on Proposed Disclosure Regulations 1 (Oct. 21, 1975). The expenses of complying with such needless requirements as recording all contributions above $10 and below $100 may well deter potential candidates from running. Senator Bentsen's campaign for the Democratic presidential nomination has already spent at least $75,000, or 10 percent of his total expenditures for the first half of 1975, just to meet the FECA's disclosure requirements. Freed, "This Time Everybody's Got a CREEP," The Washington Monthly (Nov., 1975) 31, 35.

requirement (and therefore will unwittingly violate the law). If they are aware of it, they will likely give up their plans to make independent expenditures rather than incur the resulting burdens and apprehensions.

Indeed, the federal appellees state that *Talley* establishes "that the First Amendment protects anonymous writings against government insistence on disclosure when the purpose is insufficiently important or the means are not carefully tailored to achieve only legitimate purposes" (AG Br. II 41.[61] Appellants agree with this interpretation of *Talley:* so interpreted, it must result in the conclusion that Section 434(e) is unconstitutional. Indeed, just recently in *Commonwealth* v. *Dennis*, 329 N.E. 2d 706, 708-10 (Mass. 1975), holding unconstitutional a Massachusetts statute forbidding the writing or distribution of anonymous circulars or posters designed to aid or defeat any candidate for nomination or election to any public office, the Supreme Judicial Court of Massachusetts declared:

> "It seems clear that any public interest in revealing the source of a communication so that the recipient may assess its content in light of that

[61] Federal appellees also assert that "the Court has been reluctant to apply *Talley* so as to condemn laws which require the sponsors of campaign advertisements to reveal themselves" (AG Br. II 41), citing Golden v. Zwickler, 394 U.S. 103 (1969) and Hill v. Printing Industries of the Gulf Coast, 43 U.S.L.W. 5043 (June 30, 1975). The statement mischaracterizes this Court's actions in the cited cases. In *Golden*, the Court held that plaintiff Zwickler "did not establish the existence . . . of the elements governing the issuance of a declaratory judgment. . .." 394 U.S. at 110. In *Printing Industries*, the lower court's judgment was vacated and the case remanded to consider the effect on the case of new legislation and for dismissal if moot. In neither case did this Court intimate any view of the constitutionality of the statutes in question, nor did it express any doubts about the validity of the *Talley* decision. Indeed, as the Attorney General's *amicus* brief recounts, several other lower courts have presumed that this Court in *Talley* meant exactly what it said about anonymous political speech (AG Br. I 84 n. 55).

> source does not furnish a constitutionally sufficient justification for a prohibition of all anonymous campaign literature." *Id*. at 709.

Section 434(e) is precisely such a prohibition. No such law may be squared with the First Amendment.

IX.

The Commission Is Unconstitutionally Constituted; Its Impermissible Powers, Its Domination by Congress, and the Intolerable Vagueness of the Statute It Administers Make It the Most Inappropriate and Dangerous Means Imaginable for Massive Regulation of the Political Process.

Since the members of the Federal Election Commission are officers of the United States, under Article II, § 2, cl. 2 of the Constitution they must be appointed by the President, subject to Senate confirmation. Since the current scheme provides for appointment, without presidential participation, of four members of the Commission by the two Houses of Congress, the Commission is improperly constituted, and its existence should be held unconstitutional by this Court.

In response, the FEC argues that the principal challenges to the makeup of the Commission are not ripe and that appellants lack standing to make those challenges. The Commission also defends most, but not all, of its statutory powers on the merits.[62] *Amici* Scott and Kennedy do not defend the Commission's powers with regard to civil and criminal enforcement, SK Br. at 109, restricting their support of the Commission to its other powers. The Attorney General and the United States argue that, if the questions with respect to the Commission's powers are ripe, many of those powers unconstitutionally impinge upon the prerogatives of the executive and should be held unconstitutional (AG Br. I 110-20).

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[62] Even the Commission makes no attempt to justify its power to disqualify candidates for federal office, as it does with respect to every other power it admits to having (FEC Br. 42 n. 36). Such a power is clearly unconstitutional. Powell v. McCormack, 395 U.S. 486 (1969), and appellants have a direct and immediate personal stake in the legitimacy of penalties which they and their candidates may face. Baker v. Carr, 369 U.S. 186 (1962).

The questions respecting the Commission are ripe for adjudication, and appellants do possess the requisite personal interest to assert claims of unconstitutionality. Congress has endowed the Commission with powers which neither the Congress nor an "arm of Congress," which the Commission admittedly is, may constitutionally perform. Finally, these powers are integral to Congress' conception of the FEC, and they cannot be "excised" from the FECA without violating the evident and clear intent of Congress. The proper judicial course is to hold the Commission unconstitutional in its inception, permitting the Congress to create a truly independent agency to enforce those restrictions which it may constitutionally impose upon the political process.

A. The Constitutional Issues with Respect to the Legitimacy of the Federal Election Commission Are Ripe and Are Properly Raised by Appellants.

The 1976 elections are one year away. Campaigning for federal offices at all levels is already in progress. James Buckley will likely run for re-election to the United States Senate; Eugene McCarthy is running for the Presidency; William Steiger will either run for re-election to the House of Representatives or seek election to the Senate, and each of the other appellants is a direct and active participant in the federal political process. The Commission's presence astride that process is monumental and its impact thereon overwhelming. Its already-exercised powers, including rulemaking and issuance of advisory opinions, constitute principal means of enforcement of the FECA. They presently inhibit the freedom of action of each of the appellants and their supporters, members, contributors, and candidates.

Appellants are directly subject to FEC regulation; most of them fall into the special class of persons whom the Act

recognizes as most intensely impacted by its provisions by giving them the right to seek advisory opinions from the Commission,[63] 2 U.S.C. § 437f. Congress has, moreover, provided that defined classes of persons, which include appellants, may bring suit challenging the FECA including the provisions relating to the Commission. 2 U.S.C. § 437h(a).[64] Appellants plainly have "such a personal stake in the outcome" of this lawsuit as to grant them Article III standing. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). The Commission presently is operating with its full powers and is thereby impinging upon the rights of appellants, who are bound by its actions. *Cf. Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974). To equate, as appellees do, appellants' interest here to that of any citizen or taxpayer is ludicrous.

Appellees contend that, even if the Commission is improperly constituted, appellants are not seriously affected because it makes no difference to them who enforces the FECA (FEC Br. 8, 10; see also SK Br. 109, AG Br. I 107). First, we note that the Court of Appeals held that appellants had standing and proceeded to decide on their merits the certified questions concerning the method of ap-

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[63] The Scott-Kennedy brief, SK Br. 21, is wholly incorrect in stating that the Commission is required to give "anyone" an advisory opinion.

[64] See Warth v. Selden, 43 U.S.L.W. 4906 (June 25, 1975). The passage from the Conference Report which appellees attempt to construe as excepting Commission-related issues from this provision (FEC Br. 11) cannot possibly bear that construction. The Report's phrase "related to the activities regulated by the Act" is patently a shorthand description of the criminal-code provisions enumerated in 2 U.S.C. § 437h(a) and does not limit the unqualified right of action with respect to "any provision of this Act."

As to the Commission-related issues, Section 437h(a) is effectively equivalent to the statutes in many jurisdictions which authorize specific classes of private persons, defined with reference to their interest in the question, to bring *quo warranto* proceedings. 74 C.J.S.2d 222-23.

pointment of the Commission and the validity of those of its powers which the court believed ripe (op. at 1572, 1582, 1585).

Appellees' argument is ironic in view of their general defense of the challenged legislation as a "reform" measure designed to restore public confidence. It is hardly consistent with such a goal for the entire political process to be dominated by an agency whose constitutionality is subject to the gravest doubts if there exist no prompt and effective means for resolving those doubts. Even the Attorney General, while agreeing that the constitutional questions are "of the first magnitude," AG Br. I 105, asks this Court to refrain from deciding them. Fortunately, the argument is without merit.

The separation of powers is not designed for the sole benefit of federal officeholders.[65] It is of vast importance to appellants, who are immediately affected by the operation and enforcement of the FECA, that the persons entrusted with the administration of these statutes can constitutionally be so empowered. Where, moreover, the interests appellants represent are for the most part political "outs" — challengers to incumbents, third parties, independent candidates and the like —, our contention here that the Commission is so constituted that it will disfavor such interests, and is impermissibly under the thumb of incumbent Congressmen, is one that plainly affects appellants' most vital interests.

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[65] The selective-service cases cited at FEC Br. 10 n. 6, are wholly inapposite; they turned on special features of selective-service law, *i.e.*, preinduction v. postinduction remedies and the interpretation of a regulation that draft board members shall "if at all practicable, be residents of the area in which their local board has jurisdiction." *E.g.*, United States v. Chaudron, 425 F.2d 605, 611 (8th Cir. 1970). None of these cases was dismissed for lack of standing.

This Court has long been committed to "maintaining the constitutional plan of separation of powers." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962) (opinion of Harlan, J.). The Court has vigorously exercised its obligation to protect citizens from a Congress bent on enforcing its will as well as enacting it. *Watkins* v. *United States*, 354 U.S. 178 (1957); *Quinn* v. *United States*, 349 U.S. 155 (1955); *Marshall* v. *Gordon*, 243 U.S. 521 (1917); *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881). In cases impacting the separation of powers, standing has not been limited to the official participation of the branch of government arguably aggrieved, but has been extended to those having a direct and concrete interest in observance of the constitutional principle in question. *Coleman* v. *Miller*, 307 U.S. 433 (1939); *Mitchell* v. *Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974). The appellants plainly meet that test here.

The substantive context in which the FEC operates militates strongly in favor of this Court's jurisdiction over the constitutional challenge to the Commission's existence and powers. The Commission enforces statutes which attempt to regulate the most fundamental of our liberties: the right to speak. Even assuming that some of the substantive provisions appellants challenge are constitutional, it is essential that the enforcement responsibilities under the FECA be in the proper constitutional hands. *Cf. Freedman* v. *Maryland*, 380 U.S. 51 (1965); *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). As this Court held in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247 n. 6 (1974), "[w]hichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances" an important issue which goes to the very core of appellants' freedoms under the First Amendment and the doctrine of separation of powers. See also *Mills* v. *Alabama*, 384 U.S. 214, 221-22 (1966) (Douglas, J., concurring); *Organization for a Better Austin* v. *Keefe*, 402

U.S. 415, 418 n. (1971). Under well-established principles of constitutional adjudication, this Court possesses jurisdiction over appellants' challenge to the FEC.

B. *Congress May Not Usurp the Powers of Administering and Enforcing Laws Regulating the Federal Electoral Process.*

The Commission asserts that (1) Congress has special responsibility over the federal electoral process; (2) this special responsibility implies that Congress may establish and enforce, without Executive participation, regulations controlling the conduct of Members and non-Members of Congress as that conduct may affect the federal electoral process; (3) this right of control may be devolved by Congress on its delegates; (4) the FEC is an arm of Congress; therefore, (5) the FEC can properly administer and enforce the FECA and Subtitle H.

There is no real dispute that the FEC is in fact, by virtue particularly of the appointment of four of its members solely by Congress and the retention by Congress of the power to veto its actions, an arm of Congress, an integral part of the legislative branch of the government.[66] All parties appear to agree that, if it is not, or if the nature of its powers means it cannot be, the manner of appointing it is patently unconstitutional. Constitution, Art. II, § 2, cl. 2; see *Myers* v. *United States*, 272 U.S. 52 (1926). Departing from that common ground, however, the argument for the Commission's preservation breaks down irretrievably.

[66] Apparently, only *amici* Scott and Kennedy view the Commission otherwise (SK Br. 119). The Commission believes itself to be an arm of Congress, FEC Br. 36, as do the Attorney General, the United States, the Court of Appeals, and appellants. See AG Br. I 110. The Congress appoints a majority of the Commissioners and uses the legislative veto as a means to "control [ ] its own instrumentality." *Id.* at 112.

Crucial to the Commission's position is the argument that Congress has uniquely broad administrative responsibilities with regard to the federal electoral process. In fact, Congress' authority in the area has been narrowly construed by this Court and can in no way support the massive intrusion upon Executive prerogatives attempted through the establishment of the FEC.

Article I, § 4, cl. 1 provides that Congress may "by Law" make or alter regulations pertaining to the "Times, Places and Manner of holding elections for Senators and Representatives." This involves merely the power to legislate, and in no sense authorizes Congress to act outside of its traditional legislative role, subject to the President's veto power. See *Oregon* v. *Mitchell*, 400 U.S. 112, 117 (1970) (opinion of Justice Black).[67] The Commission also relies upon Art. I, § 5, cls. 1 and 2. The first clause provides in relevant part: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ." The second clause provides in relevant part: "Each House may . . . punish its Members for disorderly behavior, and, with the Concurrence of two-thirds, expel a Member."

The jurisdiction of each House of Congress to "Judge" the elections, returns, and qualifications of its Members attaches only when an individual, with appropriate credentials, presents "himself to the [House], claiming all the

[67] The Commission makes passing reference, without case citation, to the Twelfth Amendment as constitutional authority for congressional oversight of presidential elections (FEC Br. 21-22 & n. 24). At most, the Twelfth Amendment grants to the Senate and House the right to inquire into the bona fides of electoral-college votes transmitted to them for counting. *Cf.* Barry v. United States *ex rel.* Cuninngham, 279 U.S. 597, 614 (1929). That, of course, was all that Congress did with respect to the disputed 1876 presidential contest between Hayes and Tilden. Congress may *regulate* presidential elections, as opposed to judging the "rightfulness of the claim" made by electors in specific presidential electoral-college contests, *id.*, only "by Law."

rights of membership." *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 614 (1929). The House and Senate are accorded no power by this provision to sit in judgment on elections *before* they happen.

That the power granted in the first clause of Art. I, § 5, is to be strictly limited was made plain in *Powell* v. *McCormack*, 395 U.S. 486 (1969). The Court there held that the House, in judging the qualifications of petitioner Powell under Art. I, § 5, was "limited to the standing qualifications prescribed in the Constitution." *Id.* at 550. The Court was particularly concerned with protecting the Constitution's intention "to require a two-thirds vote for expulsion," *id.* at 548, and concluded "that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote." *Ibid.*

Powell v. *McCormack* involved an attempt to exclude, not expel, a Member. The power to expel is derived from the second clause of Art. I, § 5, which speaks of the power of Congress to punish and, by a two-thirds vote, expel "a Member." The grant of power is specific and quite limited. The purpose of the grant of power is to protect Congress' "interest in preserving its institutional integrity." *Id.* at 548. It is employed "in extreme cases," *id.*, and can be invoked only by a vote of two thirds of the House in question. Whether there are additional substantive or procedural limitations on this power was a question left open by the Court in *Powell* v. *McCormack*, *supra*, 395 U.S. at 507 n. 27, n. 30; but there is no question that the power may only be exercised with respect to Members, that it requires a two-thirds vote, and that it may not be exercised with respect to other actors in the political arena.

Far from endowing Congress with a broad mandate to regulate the electoral process without participation of the Executive, these sections of the Constitution do no more

than carve out certain narrow areas in which Congress may regulate itself and police the conduct of its own Members. And these special areas where Congress may act have been carefully circumscribed by this Court. To attempt an extrapolation from such narrow areas to the extraordinarily broad powers Congress would assume for its delegates through the FEC has been charitably described by the Attorney General and the United States as "a simple *non-sequitur*" (AG Br. I 119). The bald statement of such a position by the Commission at p. 26 of its brief merely demonstrates the flight of legal fancy the Commission indulges in to protect its existence.[68]

The Commission relies on what it argues is a long history of Congressional entrustment of powers to its delegates in policing the electoral process (FEC Br. 29-30). Appellants do not contend that Congress acted illegally in the past in establishing certain of its officers[69] as receiving agents for campaign-financing reports, and if the Commission were merely to act as a depository for such information it might not impinge unduly upon Executive functions.[70]

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[68] Even if Congress had the powers the Commission claims for it in overseeing all aspects of federal elections, it is clear that such powers could not be delegated by Congress to any other body. Exclusion or expulsion of a Member is an action which only Congress can take. See, *e.g.*, Powell v. McCormack, *supra*.

[69] Of course, Congress can appoint officers of its own to assist it in the performance of its tasks. While they are officers of the United States, Art. II, § 2, cl. 2 does not require that they be presidentially appointed, for the clause expressly exempts from that requirement officers whose appointment is "otherwise provided for." Appointment of congressional officers is provided for by Art. I, § 2, cl. 5; § 3, cl. 5.

[70] But see pp. 104-06, *infra*. The enforcement powers were the functions considered by Congress most crucial to the concept of a separate Commission to participate in the regulation of the political process under the FECA. That the Commission may have other powers which standing alone might not violate the separation of powers does not save the Commission from invalidation. See pp. 108-11, *infra*.

The Commission makes numerous references to the role of the Comptroller General in the administration of prior campaign-finance legislation. See, *e.g.*, FEC Br. 31, 32, 33, 34, 40. Whatever role the Comptroller General has had in past regulation of politics (never considered by the courts) is totally unhelpful to the Commission. As Judge MacKinnon points out in his dissent below, op. at 1615, and as appellants pointed out in their opening brief, A. Br. 205, the Comptroller General is appointed by the President in conformity with Article II, § 2, cl. 2 — a fact nowhere mentioned by the Commission. The Comptroller General and the General Accounting Office are in fact and substance an independent agency, appointed for a fixed term and acting "without direction from any other officer," 31 U.S.C. § 44, not a subservient "arm of Congress" like the FEC.[71]

Finding a paucity of evidence in the area of regulation of politics to support its contention that Congress may appoint officers of the United States who perform executive functions, the Commission turns to a variety of historical "precedents" which include the American Printing House for the Blind and the National Asylum (FEC Br. at 18). It is difficult to imagine what relevance these incongruously minor situations (never considered in the courts) have to do with the massive and unprecedented invasion of executive prerogative attempted in the formation of the FEC.

[71] Even so, it is as true today as it was in 1939 that "the constitutionality of the Comptroller General's position has been much debated, to no conclusive result . . . . A decisive answer waits upon the pronouncement of an authoritative tribunal. None such has spoken . . ." Mansfield, The Comptroller General 74 (1939).

United States v. Stewart, 234 F. Supp. 94, 99 (D.D.C.), *aff'd*, 339 F.2d 753, (D.C. Cir. 1964), expressly held that with respect to his administrative functions the Comptroller General is a part of the executive branch, and that he is a legislative officer *only* with respect to the conduct of investigations.

The Commission also relies on congressional designations of named persons to particular military ranks. In *Wood* v. *United States*, 107 U.S. 414, 417 (1882), this Court held that a military officer can be appointed only by the President pursuant to Article II, § 2, cl. 2, but that once an officer had been appointed by that means, Congress could change his rank or pay, since "this is not to appoint him to a new or different office." The practice thus offers the Commission no solace here.

The two principal alleged precedents on which the Commission relies are the presidential succession acts and a statute authorizing the reduction of the national debt (FEC Br. 17-19). Reliance on the succession acts is astonishing in view of Congress' express constitutional power (Art. II, § 1, cl. 6, now supplemented by the Twenty-Fifth Amendment) to provide by law for the presidential succession. Obviously appointment to that office is "otherwise provided for," Art. II, § 2, cl. 2, with a vengeance, and thus is not subject to the presidential-appointment requirement of that clause.

The 1792 national-debt statute, 1 Stat. 281, provided, in sections 6 and 7, that the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General should be commissioners any three of whom, "with the approbation of the President of the United States," were authorized to purchase and redeem the debt of the United States. 1 Stat. 282-83. The power to reduce the debt was, in effect, given to three Executive appointees, and the Commission could not act without the "approbation" of the President. When the statute is read in the full context the Commission did not choose to provide, it offers no support whatever for the right of the Commission to exist under the constitutional scheme of separation of powers.[72]

[72] The Chief Justice who was designated as a commissioner was John Jay, who while Chief Justice also negotiated the treaty which bears his

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C. *The Commission's Principal Powers Are Constitutionally Incapable of Being Exercised by an Arm of Congress.*

The FECA grants to the Commission powers which cannot be performed by Congress directly or through its agents, but only by officers of the United States appointed pursuant to Article II, § 2, cl. 2.

Rulemaking. Integral to the enforcement of the laws is the power to make rules and regulations in interpreting the meaning of the laws. Interpretation of laws through rulemaking is not a legislative function. *Hampton & Co.* v. *United States*, 276 U.S. 394, 406-11 (1928). Substantive rulemaking is likewise primarily a matter of administration, *id.*, but if it is to be exercised by Congress or its agents such rules, amounting to new legislation, must be subject to presidential veto. The Commission — subject to *congressional* veto — has both kinds of rulemaking power, and both are bad.

The *Hampton* case involved the so-called "flexible tariff" provision of the Tariff Act of 1922 which authorized the President, after investigation, to alter tariffs levied by the United States to equalize tariff penalties between it and competing foreign countries. The Court held that Congress had not unlawfully delegated any of its legislative power to the President. The Court first noted that "it is a breach to the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power." *Id.* at 406. The Court, however, stated that one branch of

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[72] (Continued)
name with Great Britain. Presumably not even the Commission would argue that it would today be considered proper, on the basis of any such precedent, for the Chief Justice to negotiate a treaty with a foreign nation.

government may invoke the action of the other two branches "in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch." *Id.* In that context the Court stated that Congress has often found it necessary to authorize by statute the Executive officers "to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to *make public regulations interpreting a statute and directing the details of its execution*, even to the extent of providing for penalizing a breach of such regulations." *Id.* (emphasis added.) See also *id.* at 409.

It is plain that the powers to "formulate general policy" under the FECA and the parallel sections of the criminal code, 2 U.S.C. § 437d(a)(9), and to prescribe rules and regulations, §§ 437d(a)(8), 438(a)(10), are executive, not legislative, in character, and cannot be appropriated by the Legislature for itself or for a legislative agency. The Attorney General agrees (AG Br. I 116-19).

While it is settled that certain types of rulemaking powers may be vested in an independent agency whose members are appointed by the President, see *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), it does not follow that Congress can reserve such powers to itself through the vehicle of an agency totally subject to its control. If the Commission can validly make rules, those rules have the force of law and are binding on the population. Since Congress has reserved to itself (and is vigorously exercising) the power to veto such rules, 2 U.S.C. § 438(c), the rules become effective essentially as actions by Congress itself. As such — that is, as legislative acts, which is the basis on which the Commission tries to defend them (FEC Br. 54) — they are fatally defective because the constitutionally required participation of the President in the legislative process (Art. I, § 7, cl. 2) has been excluded. No legislative act by Congress can acquire the force of law unless the

President has had the opportunity to veto it. Here again, the Attorney General agrees (AG Br. I 117).

Especially troublesome are the Commission's rulemaking power with respect to the criminal code and its mandate (2 U.S.C. § 437d(a)(9)) to "formulate general policy" with respect to the enforcement of criminal statutes; such powers trench too sharply on the constitutional responsibility of the Executive faithfully to execute the laws of the land (Art II, § 3). The Commission is unwilling even to attempt a defense of the FECA's vesting of such powers in an "arm of Congress." Indeed, and astonishingly considering its own actions to the contrary, the Commission baldly tells this Court that it has not been given authority to promulgate rules governing the Title 18 criminal provisions imposing expenditure and contribution limitations (FEC Br. 49, 55).

Special counsel have apparently not yet heard of the regulation promulgated by the Commission, and rejected by the Senate, which expressly provided that certain amounts contributed to and expended from so-called "office accounts" of Members of Congress were to be considered contributions or expenditures "*subject to the limitations of 18 U.S.C. §§ 608, 610, 611, 613, 614 and 615.*" (emphasis added), which of course are the criminal provisions in question. Sen. Rep. No. 94-409, 94th Cong. 1st Sess. (October 6, 1975) at 5-7, 9. [73]

[73] The Commission ignores the fact that the disclosure and reporting provisions, as to which it does assert rulemaking authority, are themselves criminal provisions, with violations punishable by up to one year in prison. 2 U.S.C. § 441(a).

Curiously, the Commission never published these rules in the Federal Register. A notice of proposed rulemaking, containing the same language quoted above, appears at 40 Fed. Reg. 32951, § 113.2 (1975).

Similar failures of communication between the Commission and its special counsel have not been unusual in the course of this litigation. (See A. Br. 203 & n. 7.) Such inconsistencies indicate that any disclaimers by the Commission with respect to what powers it posseses should be treated with the utmost caution. The Commission should be judged on the basis of the powers it has been given by the FECA, or at least on the basis of the powers it is presently exercising, and not on the basis of those powers its counsel feel willing to defend before this Court.[74]

Nor is the rule mentioned above an isolated example. The "interim guidelines" published by the Commission on August 21, 1975, to govern the special New Hampshire Senate election, 40 *Fed. Reg.* 40668 (1975), consist of detailed instructions to the candidates and others specifying precisely what conduct is lawful and what would be criminal, with explicit references to the relevant sections of the criminal code. Many of these directions are not even interpretative, but substantive and administrative; for example:

> "For purposes of calculating the limitations on contributions and expenditures under 18 U.S.C. 608, the Commission has set July 30, 1975, . . . as a cutoff date." *Id.*, § II.

Similar "guidelines" for a special Tennessee House election were promulgated on September 16, 1975 (40 *Fed. Reg.* 43660 (1975)). Obviously, any candidate or other affected person will ignore such rules and guidelines at his extreme

[74] Special counsel's disclaimer, while nowhere explained, is presumably based on the same rationale as they articulate with respect to the civil-enforcement power. If so, it is very likely wrong, and surely academic, for the reasons discussed at pp. 100-01, and p. 103 n. 77, *infra*. In any event, the Commission is acting in complete disregard of the disclaimer.

peril. Thus, its representations to this Court notwithstanding, the Commission has already plunged fully into the implementation and administration of criminal statutes, including those limiting campaign expenditures and contributions. This it may not do.

The Commission's latest proposed rules, promulgated on September 29, 40 *Fed. Reg.* 44698 (1975), are comprehensive regulations governing a host of matters relating to the application and enforcement of the contribution and expenditure limits. These are entitled "Disclosure Regulations"; they purport to construe the disclosure provisions of the FECA, but it is observed:

> "Although *primarily* implementing title III of the cited Act [the disclosure provisions], these regulations should be read together with sections 591, 608, 610, 611, 613, 614, 615, 616, and 617 of the Federal Election Campaign Act Amendments of 1974 . . ." [the limits provisions].

This change in the Commission's verbiage, even if permanent[75] is devoid of substance. Since the definitions in the disclosure provisions of the law and in the limits sections are identical, even rules promulgated by the Commission purportedly limited to disclosure will be fully effective as a practical matter in the limits area as well, as the language quoted above suggests and as the Commission recognizes (FEC Br. 55-56). Certainly a criminal defendant who had ignored them would be deprived of any defense of

[75] Three days prior to issuing the "Disclosure Regulations," the Commission promulgated an "Advance Notice of Proposed Rulemaking," 40 Fed. Reg. 45297 (1975), dealing with many critical questions of allocations of contributions and expenditures among candidates. The Notice declares that "[t]he FEC is responsible for the administration of, for obtaining compliance with, and for formulating policy with respect to . . . [the FECA] and sections 608, 610, 611, 613, 614, 615, 616, and 617 of Title 18, United States Code."

good faith or lack of *scienter*. Even though not binding on the Attorney General and the courts, such rules, and Commission investigations pursuant to them, will have an overwhelming *in terrorem* effect on all participants in the political process.[76] Finally, a congressional agency may not constitutionally issue substantive rules implementing even disclosure requirements. Such regulations make new law; they require the concurrence of the Executive or passage over his veto. The Commission has not been exceeding its statutory authority in issuing substantive as well as interpretative rules; 2 U.S.C. § 437d(8) plainly purports to confer that power, authorizing "such rules . . . as are necessary to carry out the provisions of this Act"; see also Section 438(d).

Even purely interpretative rules nominally limited to the disclosure provisions are beyond the power of an "arm of Congress" for the reasons stated above and at pp. 104-06, *infra*.

The Commission has also begun to issue rules implementing the federal-subsidy provisions, *e.g.*, 40 *Fed. Reg.* 40671, 47688, 41933 (1975). These are largely substantive rules governing administration, rather than interpretative rules. Merely as one example, candidates seeking federal funds are required to keep and submit photocopies of checks for all contributions, *id.* at 47689, § 131.2 (c)(2), an obligation nowhere suggested in the statute. I.R.C. § 9039(b), the statutory authority for Commission rulemaking under Subtitle H, plainly permits substantive as well as interpretative rules. But administration of the federal-subsidy provisions is no more a permissible activity for an "arm of Congress" than administration of the tax laws or the nation's foreign affairs. It is flatly unconstitutional.

[76] For comments of knowledgeable members of Congress to this effect, see 121 Cong. Rec. H 10192 (remarks of Representative Hays) and H 10194 (remarks of Representative Burton) (daily ed. Oct. 22, 1975); 121 Cong. Rec. S 17881 (remarks of Senator Clark) (daily ed. Oct. 8, 1975).

Advisory Opinions. The Commission has already issued many advisory opinions; it is preparing to issue hundreds more. They span every conceivable aspect of the challenged legislation and, therefore, of the American political process. The Commission is explicitly asserting, and vigorously exercising in these opinions, the right to construe the limits provisions; no pretense is made that only the disclosure requirements are in question. And the most cursory sampling of these opinions and of requests for them confirms the extraordinary vagueness of the legislation, the host of questions they leave unanswered, and the virtually unfettered discretion of the Commission in filling the gaps. *E.g.*, 40 *Fed. Reg.* 29792, 31316, 34084, 36242, 36746, 44040, 45292 (1975) (opinions); 40 *Fed. Reg.* 26660, 28044, 28944, 30258, 31878, 36530, 49066 (1975) (requests).

These advisory opinions effectively make new law. No prudent candidate or other person will dare to ignore them; any candidate, especially, is acutely aware of the crippling impact even a threat of enforcement could have on his candidacy, wholly without regard to what precise legal effect a favorable opinion would have on *scienter* when he stands before a judge or jury. As a practical matter, at least until its initial rulemaking effort is completed, advisory opinions are the Commission's principal enforcement mechanism and chief *in terrorem* power.

It is no part of the business of Congress or of ancillary congressional agencies to issue such opinions in any area, much less in an area so deeply implicating First Amendment freedoms. The Commission's power is unconstitutional.

Civil Enforcement. The Commission has been granted "primary jurisdiction with respect to the civil enforcement of" the entire statute, including the criminal-code

provisions imposing limitations on contributions and expenditures. 2 U.S.C. § 437c(b). It is to solicit complaints, investigate possible violations, conduct hearings, and attempt to secure compliance through "informal methods"; those failing, it may institute civil actions in the courts for relief. 2 U.S.C. § 437 g.

It is the President's constitutional responsibility to "take care that the Laws be faithfully executed" (Art. II., § 3).

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[77] The Commission has issued an "interim guideline" laying down procedures for receiving and investigating complaints and holding hearings thereon; the guideline expressly embraces the expenditure and contribution limitations. 40 Fed. Reg. 28578 (1975).

[78] This provision, which refers expressly to the criminal-code provisions, is ignored by the Commission in its attempted demonstration that its enforcement powers embrace only the disclosure provisions (FEC Br. 49, 60-63). Subsections (a)(1), (2), (3) and (4) of Section 437g, providing for Commission complaints, notification of violations, investigations and hearings, likewise are expressly made applicable to the statutory limits on contributions and expenditures. Even Section 437 g(a)(5) (civil enforcement actions), on which the Commission does focus, may also embrace those provisions. The footnote to Section 434 to which the Commission refers (FEC Br. 61) specifies that the term "this Act," as used in Section 437 and elsewhere, means "the Federal Election Campaign Act Amendments of 1971 . . . as amended by P.L. 93-443, the Federal Election Campaign Act Amendments of 1974," P.L. 93-443, entitled "Federal Campaign Act Amendments of 1974," *included*, as Title I, the criminal-code expenditure and contribution limitations. 88 Stat. 1263 (1974). In any event, the distinction the Commission tries to make between two different kinds of enforcement power is wholly academic as a practical matter. If the Commission brings a proceeding, for example, to establish that a candidate has not reported what it considers to be a contribution or an expenditure, its success in that proceeding will establish that the unreported acts (if they place the candidate over any applicable limit) violate the limits, since the definitions in the disclosure and the limitations sections are the same.

That power is exclusive and applies to both the criminal and civil enforcement of the laws. *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457-59 (1869). Congress has acted unconstitutionally in attempting to usurp such power for its delegates.[79] While again there are precedents for conferring some (by no means all) of these powers on independent agencies, they may not be arrogated by Congress to its own creature.

The Commission chooses to deal with the special problem of 2 U.S.C. § 437g(a)(7) in a footnote to its brief (FEC Br. 62 n. 52). That subsection provides that "upon request by the Commission the Attorney General on behalf of the United States shall institute a civil action for relief" against violations of the statute, including the contribution and expenditure limitations of Title 18, U.S.C. The Commission contends, along with the Court of Appeals, that "shall" was not intended to be "language of command." There is nothing in the legislative history to support such a view. As the Chief Justice has recently stated: "It is well settled that 'shall' means 'must' . . . ." *Hicks* v. *Miranda*, 43 U.S.L.W. 4857, 4863 (June 24, 1975) (concurring opinion). This section removes from the Attorney General the prosecutorial discretion which lies at the very heart of that officer's responsibilities to the President and to the Constitution.

The Commission's own express authority to bring civil-enforcement proceedings, 2 U.S.C. § 437g(5), is equally indefensible. Even if it is limited to the disclosure provisions, those provisions go far beyond mere "information-gathering" for legislative-oversight purposes (FEC Br. 61, 63).[80] It is perfectly clear that the primary purposes and effects of the disclosure provisions are not legislative oversight, but (1) to require disclosure *to the public* as a dissuasive to corruption and an aid to voters in casting their ballots, and (2) to enable the FEC to collect the data and conduct the investigations on the basis of which the substantive limitations on contributions and expenditures are to be enforced. These are the very grounds on which appellees defend the disclosure provisions as constitutional (IA Br. 163-69; AG Br. II 29-31, 39; SK Br. 74-76);[81] legislative oversight is never mentioned. It follows that even the "information-gathering" function itself, in the sense of acting as a depository for reports, probably ought not to be entrusted to an arm of Congress but rather to an independent agency. Certainly the enforcement of such disclosure provisions by rules, advisory opinions, investigations, hearings, conciliation proceedings and civil actions is no constitutional part of Congress' duties.

"[T]he [congressional] power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary." *Quinn* v. *United States*, 349 U.S. 155, 161 (1955). "Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of the government. No inquiry is an end in itself; it must be related to, and in fur-

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[79] No argument can be made that the President, by signing the legislation establishing the Commission, can effectively consent to the transfer of Executive functions to delegates of the Congress. *Cf.* National Cable Television Ass'n v. United States, 415 U.S. 336 (1974).

[80] The other rationale suggested by the Commission, that the information is gathered to permit Congress to exercise a "responsibility of judging the qualifications of its own members in terms of their compliance with federal election finance laws" (FEC Br. 63), is invalid and in flat conflict with Powell v. McCormack, pp. 91-93, *supra*. As the Court there held, Congress may exclude a Member only for failure to meet the constitutional qualifications for membership.

[81] The legislative history is to the same effect. See, *e.g.*, S. Rep. No. 92-229, p. 127 (92d Cong. 1st Sess. 1971); H.R. Rep. No. 92-84, p. 4 (92d Cong. 1st Sess. 1971).

therance of, a legitimate task of Congress." *Watkins* v. *United States*, 354 U.S. 178, 187 (1957). Just as this Court held that the congressional investigation involved in *Watkins* was not for a legitimate legislative purpose, but rather for purposes of public exposure and law enforcement, so the whole panoply of enforcement powers vested in the Commission as an "arm of Congress" must be stricken down for identical reasons.

D. An Independent Agency, Not an "Arm of Congress," Would Be Required for the Exercise of Such Control as Congress May Constitutionally Enact Over the Political Process.

When all else fails, the Commission, along with *amici* Scott and Kennedy, fall back on a strictly political argument. They argue that Congress could rationally conclude that allowing the President to appoint the Commissioners of the FEC would lead to undue influence by the President over the Commission and further undermine confidence in our governmental system. See FEC Br. 42; SK Br. 120-22.

In all the talk by the Commission and *amici* Scott and Kennedy about the dangers of allowing the President to appoint, there is no mention of the Senate power of confirmation. Art. II, § 2, cl. 2. The Senate can demand that those the President appoints to the FEC be individuals of high competence and integrity. And fixed terms of office free the Commissioners, once appointed, from undue influence by either the President or the Congress. [82]

The constitutional scheme of appointment and confirmation can work. All that it requires is a Senate of sufficient conscientiousness. For example, the Senate inquired into then-Attorney General designate William B. Saxbe's commitment to the independence and freedom of action of then-Special Prosecutor Leon Jaworski. *United States* v. *Nixon*, *supra*, 418 U.S. at 695 n. 9. And it is settled that, through the independent-agency device, Congress may specify fixed terms for agency members and thus render them independent of the President's power of removal. *Humphrey's Executor* v. *United States*, *supra*; *Weiner* v. *United States*, 357 U.S. 349 (1959).

[82] Congress can, of course, also specify qualifications for persons to be appointed. The present law, 2 U.S.C. § 437c(a) (3), imposes some such qualifications; they could be greatly strengthened.

Appellees imply that the constitutional scheme of appointment should be disregarded in this case because of "recent events," FEC Br. 42, referring no doubt to the events of 1974. Those events, however, did not demonstrate the inability of the constitutional scheme of government to function. Quite to the contrary, adherence to the Constitution by the vigorous efforts of the Legislature, the Executive (through the Office of Special Prosecutor and the Department of Justice) and the Judiciary resolved the crisis and brought a measure of stability and renewed respect for the institutions of government to the people. The Constitution has worked and will work. Congress may not amend it by fiat through the creation of the FEC.

The notion of *amici* Scott and Kennedy that the FEC is independent is, of course, fanciful. The Commission has sent two sets of regulations to the Congress. Sen. Rep. No. 94-409, 94th Cong., 1st Sess. (Oct. 6, 1975); House Doc. No. 94-231, 94th Cong., 1st Sess. (Aug. 1, 1975). The Congress, in the exercise of its power to veto any rules or regulations issued by the Commission, 2 U.S.C. § 438(c), vetoed both sets of regulations. The Senate, on the advice of its Committee on Rules and Administration, Sen. Rep. No. 94-409, *supra*, vetoed the regulations which would have included some "office account" spending by Members of Congress under the contribution and expenditure limitations of Title 18. 121 *Cong. Rec.* S. 17888 (daily ed. Oct. 8.

1975).[83] Likewise, the House of Representatives, on the recommendation of its Committee on House Administration, House Rep. No. 94-552, 94th Cong., 1st Sess. (Oct. 9, 1975), vetoed a set of regulations which would have required political candidates, including Members of Congress, to file their campaign financial reports with the FEC rather than with the Secretary of the Senate and the Clerk of the House. 121 *Cong. Rec.* H 10197 (daily ed. Oct. 22, 1975). See Weaver, "Election Agency Set Back In House," New York Times, October 23, 1975, at 1, col. 4. Representative Dickinson expressed the general view: the regulation should be rejected because "[i]t is very important that this House maintain control over the election procedures of its Members, as well as other Federal officials." 121 *Cong. Rec.* H 10191-92. The vote in the House was 257 to 148 to veto the regulations.

It is clear that the Commission is independent in no meaningful sense of the word. The Commission is the instrument of Congress.

E. *The Appropriate Remedy for the Unconstitutionality of the Commission Is To End Its Existence.*

Since the Commission is unconstitutionally constituted, the question remains as to the appropriate remedy. The Commission argues that, should some of its powers be found impermissible for an arm of Congress, the Court

[83] Appellant James Buckley, a Member of the Senate, voted against the regulations. He will continue to vote against any and all regulations promulgated by the Commission, because in his view the Commission is an unconstitutional agency and is enforcing legislation which strikes at basic First Amendment freedoms. While the vote as recorded was close, only one Senator spoke in favor of the regulation and it is plain that whatever votes were needed to defeat it would have been forthcoming. See Weaver, "Senate Rejects 'Slush Fund' Curb," New York Times, Oct. 9, 1975, at 15 col. 1.

should merely excise those powers and allow the Commission to continue otherwise to function (FEC Br. 51-52 n. 43).

The Commission correctly contends that the issue of severability is one of congressional intent, but its position that such intent is conclusively established by 2 U.S.C. § 454, a severability provision, is too simple.[84] *Ibid.* The existence of the severability provision is of little help in divining the intent of Congress with respect to the powers and existence of the FEC. The presence or absence of a severability clause generally has little if any impact on the ultimate determination of severability. *United States* v. *Jackson*, 390 U.S. 570, 585 n. 27; *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924).

The question of severability is one of "statutory construction and of legislative intent." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 313 (1936). It is evident from the legislative history of the FECA Amendments that the "basic purpose" of Congress, *United States* v. *Jackson*, *supra*, 390 U.S. at 591, in establishing the FEC was to create an agency with strong enforcement powers. Congress had also intended that the Commission be independent, but, as the Commission itself admits (FEC Br. 36), was unsuccessful in that regard.

Senator Clark, a strong supporter of the FEC, see Sen. Rep. No. 94-409, 94th Cong., 1st Sess. (Oct. 6, 1975) at 23-24, declared that "[o]f special significance" was the "Commission's civil enforcement authority, which will help insure that correction of election law violations will not depend entirely on action by a Department of Justice that has traditionally ignored such abuses." 120 *Cong. Rec.* S

[84] That provision is not even found in the 1974 FECA Amendments, but in the original 1971 FECA, which did not establish an FEC. Pub. L. 92-225, Title 4, § 404, Feb. 7, 1972, 86 Stat. 20. The 1974 Amendments contain no severability clause.

18529 (daily ed. Oct. 8, 1974). He also referred to the Commission as "independent," *ibid*.

Similarly Senator Javits, a strong supporter of the FECA Amendments, said:

> "A most important feature of the bill is the independent Federal Election Commission which will enforce the new law. The Commission will have the power to bring civil suits under the new law and will be a great improvement over the present weak system."

120 *Cong. Rec.* S 18538 (daily ed. Oct. 8, 1974).

Representative Frenzel, a key sponsor of the FECA Amendments, likewise emphasized the Commission's independence and its civil enforcement powers. In fact, Representative Frenzel made no mention in his analysis of any Commission powers other than those integral to law enforcement. 120 *Cong. Rec.* H 10331 (daily ed. Oct. 10, 1974). Representative Heckler made the following defense of the Commission during floor debate:

> "One of the most important provisions of the legislation before us is the creation of a strong and independent Federal Election Commission which will oversee all Federal elections and be empowered to enforce the new law by subpenaing witnesses, conducting investigations of campaign abuses, and by bringing civil suits to court." 120 *Cong. Rec.* H 10344 (daily ed. Oct. 10, 1974).

The intent of Congress was clearly to create a strong commission, on the model of the independent regulatory agency such as the ICC, whose principal function would be

to enforce the law with vigor.[85] Congress obviously failed to give the Commission the independence that would permit the Commission to carry out its mandate to enforce the FECA. The remedy is a simple one. Since the Commission cannot as presently constituted perform its vital functions, the Commission itself should be invalidated. Congress may then, if it wishes, reestablish the Commission with its enforcement powers (with respect to those substantive provisions of the law which are constitutional; many are unchallenged by appellants, see p. 14 n. 10, *supra*) largely intact,[86] taking care that the constitutional scheme of appointment is followed. Merely to excise those powers found to be impermissible would result in the existence of a type of commission which was never contemplated by those who created the FEC.

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[85] A further indication of congressional intent is 2 U.S.C. § 437d (a) (8), which provides that the rulemaking powers given the FEC shall only be exercised in accordance with chapter 5 of Title 5, U.S.C., the Administrative Procedure Act. The APA defines "agency" so as *not* to include Congress. 5 U.S.C. § 551 (1) (A). Thus it appears that Congress had in mind that the Commission, rather than being an arm of Congress, would be an independent regulatory agency to which the APA would apply.

[86] Congress cannot grant an independent and properly appointed commission all of the FEC's powers. For example, no authority may disqualify a person from future political candidacy. See p. 85 n. 62, *supra*. Also, the FEC may not — in any incarnation — force the Attorney General to bring suit. See pp. 103-04, *supra*.

F. The Unconstitutional Vagueness of the Statute, Coupled with the Legislative Veto, Gives Incumbent Members of Congress the Unbridled Discretion To Regulate the Political Practices of Themselves and Their Challengers.

So far the Commission has adopted two rules. Both have been vetoed — one by the Senate, the other by the House (pp. 107-08, *supra*). It is now plain that the vast discretionary powers over political speech which the Act creates will be exercised, on an *ad hoc* basis, at least as much by Congress itself as by the Commission. And these *ad hoc* decisions will frequently involve, as the regulation rejected by the Senate did, immensely potent questions of whether the Act as implemented is even more discriminatory in favor of incumbent Members of Congress, and against challengers, than the statutory text itself. One might have expected that a larger measure of Commission independence would have been endured by Congress, and a larger measure of impartiality evidenced, until this litigation had been decided. Surely no greater restraint can be expected from future congressional actions if this legislation and the Commission structure, including the legislative veto, are upheld.

We have lodged with the Clerk 20 copies of the Senate debate on the so-called "office account" regulation, 121 Cong. Rec. S 17873-89 (daily ed. Oct. 8, 1975). Although this debate dealt with only one very narrow area among the vast array of matters governed by the challenged legislation, a careful reading is richly enlightening as to many of the points we have tried to highlight in this brief and in our previous brief. It is hard to say which senatorial attitude emerges most vividly from these pages — a firm determination that Congress, not the Commission, shall have the primary and final word in interpreting and applying the Act;[87] an urgent concern that the interests of

[87] 121 Cong. Rec. S 17875 (Senator Hatfield), 17876 (Senator Pell), 17883 (Senator Stevens), 17887 (Senator Humphrey), 17889 (Senator Bellmon).

incumbents not, to say the least, be disadvantaged;[88] a feeling of frustration that the Commission's rules are confusing, indeed unintelligible;[89] a growing belief that the statute itself is unintelligible, and in some of its apparent implications absurd;[90] an uneasy awareness that in this murky area one misinterpretation by a candidate or campaign official can lead to jail;[91] and, on the part of at least one Senator, an evolving conviction that the legislation is both unwise and unconstitutional as an invasion of freedom of speech.[92]

[88] 121 Cong. Rec. S 17874 (Senator Cannon), 17875-76 (Senator Pell), 17880, 17882 (Senator Stevens), 17881 (Senators Ford, Pell), 17884-85 (Senator Huddleston), 17886-87 (Senator Huddleston), 17889 (Senators Morgan, Javits).

[89] 121 Cong. Rec. S 17874 (colloquy between Senators Cannon and Johnston), 17887-78 (Senator Hatfield), 17878 (Senator Pell), 17882 (Senators Cannon, Stevens), 17883 (Senator Stevens), 17884 (Senator Huddleston), 17886-87 (Senator Humphrey), 17888 (Senator Cannon).

[90] 121 Cong. Rec S 17879 (colloquy between Senators Clark and Johnston), 17879-80 (colloquy between Senators Clark and Packwood) 17880 (colloquy between Senators Clark and Stevens), 17881-82 (colloquy among Senators Ford, Clark, Huddleston, Pell and Hatfield), 17883 (Senator Clark), 17886-87 (Senator Humphrey), 17887 (Senator Pastore). Commentators are likewise becoming increasingly aware of the almost incredible complexity both of the statute and of the Commission's regulations, forms and other requirements and of the burdens, expense and perils they impose on those subject to them. *E.g.*, Pincus, "Making Campaign Rules Complex," Washington Post, Sept. 15, 1975, at A 22, col. 3.

[91] 121 Cong. Rec. S 17880 (Senator Pell), 17882 (Senators Hatfield and Stevens). To the same effect see Weaver, "Ford Campaign Panel Contends Election Unit Acts Beyond Law," New York Times, Oct. 22, 1975, at 27, col. 4.

[92] 121 Cong. Rec S. 17889 (Senator Muskie).

There must be better ways to repair the ravages of Watergate and to restore public confidence in government than this.

Respectfully submitted,

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